FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 03-15509
D.C. No. CVS-98-0106 LLK

JEFFREY WELTON NUNES, *Petitioner-Appellee,*
v.
G.A. MUELLER, Warden, *Respondent-Appellant.*

OPINION

Appeal from the United States District Court
for the Northern District of California
Laurence K. Karlton, District Judge, Presiding

Argued and Submitted
August 13, 2003 – San Francisco, California
Filed December 1, 2003

Before: Stephen Reinhardt and Susan P. Graber,
Circuit Judges, and Milton I. Shadur,* District Judge

Opinion by Judge Shadur; Dissent by Judge Graber

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* The Honorable Milton I. Shadur, Senior District Judge for the Northern District of Illinois, sitting by designation.

SUMMARY

Criminal Law and Procedure/Habeas Corpus

The court of appeals affirmed a judgment of the district court. The court held that a defendant can make out a prima facie case of ineffective assistance of counsel during the plea bargaining process by claiming that: (1) his attorney gave him the wrong information and advice about the state's plea offer, and (2) if he had been informed accurately, he would expressly have taken the bargain.

In 1989, appellee Jeffrey Nunes was charged in California with one count of murder and three counts of assault with a firearm for the shooting of a man he found sleeping in his estranged wife's bedroom. In his first two trials, juries were hung in favor of a life sentence, while the third trial resulted in a conviction for second-degree murder that was overturned solely on procedural grounds. Before Nunes' fourth trial, the prosecutor made a plea offer to Nunes' attorney Michael Brady, that Nunes plead guilty to voluntary manslaughter, waive all presentence credits on that voluntary manslaughter charge and serve a sentence of 11 years. In exchange the prosecutor would drop the second-degree murder charge, the firearm enhancement would be dismissed, and Nunes would get full credit for the time he had already served toward his assault conviction. Nunes claimed that Brady told him incorrectly that he was being offered a 22-year sentence that included the firearm enhancement and waived all presentence credits for the time previously served, and that he asked Brady to clarify the offer, but in the meantime Brady told the prosecutor that Nunes had rejected the plea bargain. At some point after that meeting and before his trial, Nunes' mother told him that the actual plea offer was different from what he had thought. It was not until the day the fourth trial began that Nunes was able to talk with Brady—after the offer had already expired. In the fourth trial Nunes was again convicted of second-degree murder and received a 15-years-to-life sentence, with a two-year enhancement for the use of a firearm.

Nunes challenged his conviction on direct appeal and then by a state court petition for a writ of certiorari, claiming among other things that Brady had provided ineffective assistance of counsel by failing to inform him fully of the actual terms of the plea offer made by the prosecution. That claim was rejected by the California Court of appeals, which found it unnecessary to hold an evidentiary hearing because Nunes had not made out a prima facie case for prejudice. After the state courts had rejected his claim, Nunes filed a pro se petition under 28 U.S.C. § 2254 in federal district court. Finding that Nunes had shown both that his counsel's conduct fell outside the range of professional competence and that he had suffered prejudice as a result, the district court granted Nunes' petition in part and ordered the state to vacate his second degree murder conviction, and to reinstate the plea offer to voluntary manslaughter.

Appellant Folsom State Prison Warden Glenn Mueller appealed.

[1] Under *Strickland v. Washington*, 466 U.S. 668 (1984), in a claim of ineffective assistance of counsel, a defendant must demonstrate (1) that counsel's representation fell below an objective standard of reasonableness, and (2) that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.

[2] Criminal defendants are entitled to effective assistance of counsel during all critical stages of the criminal process. That right (and the corresponding *Strickland* analysis) applies to ineffective-assistance claims arising out of the plea process.

[3] The Sixth Amendment right to effective assistance of counsel guarantees more than the Fifth Amendment right to a fair trial—it serves to protect the reliability of the entire trial process. The right to counsel extends to cover all critical stages of the prosecution; the period from the arraignment until the beginning of trial can be perhaps the most critical period of the proceedings. The historical background suggests that the core purpose of the counsel guarantee was to assure assistance at trial, but the Supreme Court has over time recognized the

importance of expanding that right because "assistance" would be less than meaningful if it were limited to the formal trial itself.

[4] During all critical stages of a prosecution, which must include the plea bargaining process, it is counsel's duty to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution. The right that Nunes claimed he lost was not the right to a fair trial or the right to a plea bargain, but the right to participate in the decision as to, and to decide, his own fate—a right also clearly found in Supreme Court law.

[5] The state court's decision applied the law to the facts unreasonably because Nunes clearly made out a prima facie case of ineffective assistance of counsel under *Strickland*. With Nunes' claims being taken at face value as the state court claimed it had done, the factual scenario was (1) that Nunes' attorney gave him the wrong information and advice about the state's plea offer, and (2) that if Nunes had instead been informed accurately, he would expressly have taken the bargain. [6] Those assertions certainly sufficed to support an ineffective assistance claim, and there was ample evidence in the record before the state court to support those assertions. [7] While there may be instances where the state court can determine without a hearing that a criminal defendant's allegations are entirely without credibility or that the allegations would not justify relief even if proved, that was certainly not the case here. [8] The district court's determination that Nunes was entitled to habeas relief for his ineffective assistance of counsel claim had to be affirmed.

[9] The ineffective assistance occurred before trial, and the harm consisted in Brady's failure to communicate a plea offer to Nunes. Under such circumstances the constitutional infirmity would justify Nunes' release, but if the state put him in the same position he would have been in had he received effective counsel, that would cure the constitutional error.

Judge Graber dissented, writing that it could not be said that

the state court was objectively unreasonable in deciding that Nunes did not present objective, corroborating evidence sufficient to make out a prima facie claim of prejudice

COUNSEL

Morris Beatus, Deputy Attorney General, San Francisco, California, argued the case for the respondent-appellant and was on the briefs. Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gerald A. Engler, Senior Assistant Attorney General and Peggy S. Ruffra, Supervising Deputy Attorney General were also on the briefs.

Daniel J. Broderick, Chief Assistant Federal Defender, San Francisco, California, argued the case for the petitioner-appellee and was on the brief. Quin Denvir, Federal Defender, Sacramento, California was also on the brief.

OPINION

SHADUR, District Judge:

Folsom State Prison Warden Glenn A. Mueller ("Mueller") appeals the district court's order granting habeas corpus relief under 28 U.S.C. § 2254[1] to Folsom prisoner Jeffrey Welton Nunes ("Nunes"). That relief was predicated on Nunes' claim that he had received ineffective assistance of counsel during the plea bargaining process, and it resulted in a direction to the state (1) to vacate Nunes' conviction for second degree murder and (2) to reinstate its plea offer of voluntary manslaughter. We agree with the district court that Nunes' counsel failed to provide constitutionally adequate assistance, but we find that the relief granted should be modified: We remand to the district court for the entry of an order releasing Nunes unless the state offers him the same terms that he would have received under the

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1. All further citations to Title 28 provisions will simply take the form "Section ___."

original plea offer, and then for the conduct of further proceedings consistent with this opinion.

BACKGROUND

On August 28, 1989 Nunes was charged with one count of murder and three counts of assault with a firearm for the 1988 shooting of a man he found sleeping in his estranged wife's bedroom. In Nunes' first trial in 1989 the jury hung on the murder charge but found Nunes guilty of one count of assault with a firearm, one count of personal use of a firearm and two misdemeanor counts of exhibiting a firearm. Nunes was retried on the murder charge in 1990, and that second trial also ended with a hung jury, although the jury did unanimously decide that Nunes was not guilty of first degree murder. In a third trial in 1991 the jury found Nunes guilty of second degree murder and subject to the firearm use enhancement. That conviction was later reversed on appeal because the trial judge had spoken to the deliberating jury outside the presence of Nunes and his attorney.

On July 22, 1993, before Nunes' fourth trial, the prosecutor made a plea offer to Nunes' defense attorney Michael Brady ("Brady") that Nunes plead guilty to voluntary manslaughter, waive all presentence credits on that voluntary manslaughter charge and serve a sentence of 11 years. (SER 60) In exchange the prosecutor would drop the second-degree murder charge, the firearm enhancement would be dismissed and Nunes would get full credit for the time he had already served toward his assault conviction. (SER 143) Brady then met with Nunes for just five minutes to discuss the plea offer. Nunes claims that Brady told him incorrectly that he was being offered a 22-year sentence that included the firearm enhancement and waived all presentence credits for the time previously served. (SER 66) Nunes further claims that he asked Brady to clarify the offer, (SER 124) but in the meantime Brady told the prosecutor that Nunes had rejected the plea bargain. (SER 74)

At some point after that meeting and before his trial, Nunes' mother told him that the actual plea offer was different from

what he had thought. (SER 67) Though Nunes tried to reach Brady to clarify the offer, he was unable to do so. It was not until the day the fourth trial began that Nunes was able to talk with Brady—after the offer had already expired. (SER 112, 132) In the fourth trial Nunes was again convicted of second-degree murder and received a 15-years-to-life sentence, with a two-year enhancement for the use of a firearm.

Nunes challenged his conviction on direct appeal and then by a state court petition for a writ of certiorari. (ER 64-94) There Nunes claimed among other things that Brady had provided ineffective assistance of counsel by failing to inform him fully of the actual terms of the plea offer made by the prosecution. (ER 91-94) That claim was rejected by the California Court of Appeals, which found it unnecessary to hold an evidentiary hearing because Nunes had not made out a prima facie case for prejudice—"that but for counsel's deficient performance, the defendant would have accepted the plea bargain." (ER 93 (internal quotation marks and citation omitted))

After the state courts had rejected his claim, in 1998 Nunes filed a pro se Section 2254 petition in the federal district court for the Eastern District of California.[2/] After Mueller answered the petition, the magistrate judge held a two-day evidentiary hearing on Nunes' ineffective assistance claim. (ER 15-34) On November 20, 2002 the magistrate judge recommended that Nunes' petition be granted on that ground, (ER 2-52) concluding that the state court ruling was (1) erroneous and (2) contrary to federal law as clearly established in *Strickland v.* Washington, 466 U.S. 688, 690-93 (1984). (ER 21, 23) Finding that Nunes had shown both that his counsel's conduct fell outside the range of professional competence and that he

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2. That petition was initially dismissed because it was a mixed petition—it included claims that had not been exhausted in state court. With the help of appointed counsel, Nunes then filed an amended petition raising only exhausted claims, together with a motion to stay proceedings that was granted by the district court. After exhausting his claims in state court, Nunes filed a motion for leave to amend his petition to include those newly exhausted claims. That motion was granted on June 24, 1999.

had suffered prejudice as a result, the magistrate judge recommended that the district court grant Nunes' petition in part and order the state (1) to vacate his second degree murder conviction and (2) to reinstate the plea offer to voluntary manslaughter. (ER 51)

On January 8, 2003 the district court adopted the magistrate judge's findings and recommendations in full. (ER 55-56) Mueller filed a timely notice of appeal and moved for a stay pending appeal. On May 20, 2003 a panel of this court issued an order granting the stay and expediting this appeal.

Mueller raises three issues on appeal. First, he contends that the state court's decision rejecting Nunes' ineffective assistance claim was not contrary to clearly established law because unless Nunes lost a substantive or procedural right (and Mueller claims he did not), Nunes was not prejudiced by his attorney's shortcomings. Second, Mueller argues that the state court reasonably applied the *Strickland* analysis in concluding that Nunes failed to establish that he would have accepted the plea had it been properly communicated to him. Third, Mueller claims that the district court was out of bounds in any event when it ordered the state to give Nunes the same deal that it had offered him before the trial.

STANDARD OF REVIEW

We review the district court's decision to grant habeas corpus relief de novo (*Evanchyk v. Stewart*, 340 F.3d 933, 939 (9th Cir. 2003)) and its findings of fact for clear error (*McClure v. Thompson*, 323 F.3d 1233, 1240 (9th Cir. 2003)). We may affirm the district court's decision on any ground supported by the record, even if it differs from the district court's rationale (*Paradis v. Arave*, 240 F.3d 1169, 1175-76 (9th Cir. 2001)).

Section 2254(d), as revised by the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"),[3] instructs federal

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3. Nunes originally filed his habeas petition in 1998, well after AEDPA's 1996 amendments to Section 2254(d) became effective.

courts not to grant a state prisoner's habeas petition as to claims that a state court "adjudicated on the merits" unless the adjudication (1) "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court" or (2) "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." Ineffective assistance claims are generally resolved under the first standard, which controls both pure questions of law and mixed questions of law and fact, but the second standard applies to the extent a habeas petition challenges any factual determinations of the state court (*Davis v. Woodford*, 333 F.3d 982, 990 (9th Cir. 2003)).

"Clearly established Federal law," as used in Section 2254(d)(1), refers to "the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision" (*Lockyer v. Andrade*, 538 U.S. 63, 123 S.Ct. 1166, 1172 (2003)). As to whether a state court's decision is "contrary to" clearly established law, that is a function of whether that court either (1) applied the wrong authority or (2) applied the right authority but arrived at a "diametrically different" result despite materially indistinguishable facts (*Williams v. Taylor*, 529 U.S. 362, 406 (2000)). Alternatively, the state court would have "unreasonably applied" the law if it identified the right legal principle but applied it in an objectively unreasonable way or if it (unreasonably) extended the law to a context where it should not apply (*Alvarado v. Hickman*, 316 F.3d 841, 852 (9th Cir. 2002), citing *Williams*, 529 U.S. at 404-06)). It is not enough for us to determine in our independent judgment that the state court decision was incorrect or erroneous—instead the important question is whether the state court's decision was "objectively unreasonable" (*Wiggins v. Smith*, ___ U.S. ___, 123 S.Ct. 2527, 2535 (2003)).

RIGHT TO COUNSEL DURING PLEA BARGAINING

[1] *Strickland v. Washington*—the most sensible place to begin evaluating any claim for ineffective assistance of counsel—teaches that the benchmark for assessing such claims must be "whether counsel's conduct so undermined the proper

functioning of the adversarial process that the trial cannot be relied on as having produced a just result" (466 U.S. at 686). Defendant must demonstrate (1) "that counsel's representation fell below an objective standard of reasonableness" and (2) "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different" (*Williams*, 529 U.S. at 390-91, quoting *Strickland*, 466 U.S. at 688, 694). And as *Wiggins*, 123 S.Ct. at 2542, quoting *Strickland*, 466 U.S. at 694, has reconfirmed:

> A reasonable probability is a probability sufficient to undermine confidence in the outcome.

Mueller argues that the state court applied the *Strickland* test properly and that its conclusion—that Nunes was not prejudiced by his counsel's poor performance—was not contrary to Supreme Court authority, because no Supreme Court case has ever found prejudice where the criminal defendant received a fair trial despite inadequate counsel. Irrespective of whether Nunes' counsel met professional standards, Mueller notes correctly that under existing Supreme Court law Nunes cannot claim he was prejudiced if his counsel's incompetence did not deprive him of a substantive or procedural right (*Williams*, 529 U.S. at 393). And Mueller observes (again correctly) that the Constitution does not afford Nunes the right to a plea bargain (*Weatherford v. Bursey*, 429 U.S. 545, 561 (1977)).

[2] But Mueller incorrectly contends that it necessarily follows that Nunes did not lose any substantive or procedural right— and therefore did not suffer any prejudice—when his counsel failed to communicate the plea offer to him accurately. After all, the right that Nunes argues he lost was not the right to a plea bargain as such, but rather the right to counsel's assistance in making an informed decision once a plea had been put on the table. It has long and clearly been held that criminal defendants are entitled to effective assistance of counsel during all critical stages of the criminal process (*Powell v. Alabama*, 287 U.S. 45, 57 (1932); *Brewer v. Williams*, 430 U.S. 387, 398 (1977)). And *Hill v. Lockhart*, 474 U.S. 52, 57 (1985) applied that right (and the corresponding *Strickland* analysis) "to

ineffective-assistance claims arising out of the plea process."

Mueller claims that the real harm the Supreme Court sought to avoid in *Hill* arises only where the defendant actually pleads guilty, because in those situations the defendant surrenders his or her right to a fair trial. Mueller argues that a defendant who refuses a plea bargain is not deprived of that right and therefore suffers no prejudice. Mueller's narrow reading of *Hill* is not entirely outre, for the opinion there did frame the prejudice inquiry—in the context then at issue—in terms of whether "but for counsel's errors, [defendant] would not have pleaded guilty and would have insisted on going to trial" (*id.* at 59). And the Supreme Court has stated elsewhere that "the right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial" (*United States v. Cronic*, 466 U.S. 648, 658 (1984)).

[3] But "the Sixth Amendment right to effective assistance of counsel guarantees more than the Fifth Amendment right to a fair trial"—it serves to protect the reliability of the entire trial process (*United States v. Blaylock*, 20 F.3d 1458, 1466 (9th Cir. 1994), quoting *United States v. Day*, 969 F.2d 39, 45 (3d Cir. 1992)). Over 70 years ago *Powell*, 287 U.S. at 57 extended the right to counsel to cover all critical stages of the prosecution and recognized that the period from the arraignment until the beginning of trial can be "perhaps the most critical period of the proceedings." As *United States v. Ash*, 413 U.S. 300, 309-10 (1973) has chronicled, the "historical background suggests that the core purpose of the counsel guarantee was to assure 'Assistance' at trial," but the Court has over time recognized the importance of expanding that right because "'Assistance' would be less than meaningful if it were limited to the formal trial itself."

[4] During all critical stages of a prosecution, which must include the plea bargaining process, it is counsel's "dut[y] to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution" (*Strickland*, 466 U.S. at 688). Those

obligations ensure that the ultimate authority remains with the defendant "to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal" (*Jones v. Barnes*, 463 U.S. 745, 751 (1983)). Here the right that Nunes claims he lost was not the right to a fair trial or the right to a plea bargain, but the right to participate in the decision as to, and to decide, his own fate—a right also clearly found in Supreme Court law.[4/]

Even so, Mueller is correct that the state court ruling was not "contrary to" clearly established Supreme Court law. It followed a California Supreme Court decision (*Alvernaz*, 830 P.2d 747), which sets forth the same requirements as *Strickland* for demonstrating an ineffective assistance claim in the context of plea bargaining. And the United States Supreme Court has not examined a case whose facts provide sufficient comparability for us to conclude that the result reached by the state court was at odds with established Supreme Court caselaw. We therefore reject the conclusion of the magistrate judge and the district court judge that the state court decision was contrary to clearly established Supreme Court law.

That does not of course end the analysis, for habeas relief can also be granted where the state court unreasonably applied the law or where the factual determination was unreasonable in light of the evidence presented. We now turn our attention to those questions.

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4. Alternatively we note (and Mueller himself concedes) that California law clearly recognizes the right to effective assistance of counsel during the plea bargaining process (*In re Alvernaz*, 830 P.2d 747 (Cal.1992)). While clearly established Supreme Court law provides that counsel's incompetence must deprive the defendant of a substantive or procedural right to rise to a constitutional violation, it does not require that the federal Constitution be the source of the substantive or procedural right being deprived—indeed, *Williams*, 529 U.S. at 393 suggests just the opposite.

PREJUDICE

We first examine precisely what the state court did:

1. It decided from the record that Nunes failed to make out a prima facie case for ineffective conduct of counsel.

2. It found that an evidentiary hearing was unnecessary and concluded on the record that Nunes could not show he would have accepted the state's plea offer had his attorney communicated it to him accurately.

3. It held that Nunes' contentions were meritless "on their face." (ER 29 n. 12)

4. It found that materials Nunes included in the record that showed his counsel's delinquency were "of dubious relevance" (*id.*) and rejected as "simply not credible" Nunes' claim that he could not reach his attorney to clarify the plea offer. (*id.*30)

5. It also inferred that someone in Nunes' shoes who was facing a fourth trial would likely choose to go that fourth round rather than accept a plea offer. (*id.*)

And we note that all of that took place despite that court's having said that it took Nunes' claims at face value.

We hold that the state court's rejection of Nunes' habeas claim is unreasonable under both Sections 2254(d)(1) and (2).[5/] Under the AEDPA standard of review, it is entirely appropriate—even necessary—that federal courts ask whether

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5. As is evident from our discussion, we reject the magistrate judge's approach, following *Van Tran v. Lindsey*, 212 F.3d 1143, 1155 (9th Cir. 2000), that a federal court must first determine whether the state court decision was erroneous before applying the AEDPA standard of review. *Lockyer*, 123 S.Ct. at 1172 has expressly disagreed with that method because "the only question that matters under § 2254(d)(1) [is] whether a state court decision is contrary to, or involved an unreasonable application of, clearly established Federal law."

the state court applied correct legal principles (in this case, the *Strickland* analysis) in an objectively unreasonable way (*Williams*, 529 U.S. at 404-06), an inquiry that requires analysis of the state court's *method* as well as its result.

[5] In those terms the state court's decision applied the law to the facts unreasonably because Nunes clearly made out a prima facie case of ineffective assistance of counsel under *Strickland*. With Nunes' claims being taken at face value as the state court claimed it had done, the factual scenario was (1) that Nunes' attorney gave him the wrong information and advice about the state's plea offer and (2) that if Nunes had instead been informed accurately, he would expressly have taken the bargain.

[6] Those assertions certainly suffice to support an ineffective assistance claim, and there was ample evidence in the record before the state court to support those assertions.[6] With the state court having purported to evaluate Nunes' claim for sufficiency alone, it should not have required Nunes to prove his claim without affording him an evidentiary hearing—and it surely should not have required Nunes to prove his claim with absolute certainty. Nunes needed only to demonstrate that he had sufficient evidence for a reasonable fact finder to conclude

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6. According to the dissent, *Alvernaz*, 830 P.2d at 756 requires that a habeas petitioner must always proffer some evidence other than his or her own statement to state a cognizable claim of ineffective assistance of counsel during the plea bargaining process. But that does not at all support the analytical edifice that the dissent has sought to erect on that foundation, for the situation here—as our text analysis hereafter demonstrates—is that Nunes *did* present objective corroborative evidence to the state court, but the state court unreasonably rejected it as not credible and hence as unpersuasive. We do observe, however, that the *Alvernaz*, statement of such a universal requirement of corroboration is in substantial tension with *Strickland's* discouragement of "mechanical rules" that distract from an inquiry into the fundamental fairness of the proceedings, and with its holding that "a court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury" (*Strickland*, 466 U.S. at 695). But that aside, the state court's unreasonableness runs far deeper—for the state court did not conclude that Nunes failed to produce sufficient evidence, but rather that the evidence Nunes did produce failed to persuade.

with "reasonable probability" that he would have accepted the plea offer, a probability "sufficient to undermine the result" (*Strickland*, 466 U.S. at 694.) He met that burden, and to the extent that the state court demanded more it applied the *Strickland* test unreasonably. In other words, it was objectively unreasonable for the state court to conclude on the record before it that no reasonable factfinder could believe that Nunes had been prejudiced.

If we rather view the state court's findings as a factual determination, the outcome there is equally problematic under AEDPA. Its assessment of the evidence went well beyond its self-assigned task of assessing Nunes' allegations for sufficiency to determine whether Nunes would be entitled to relief. State court findings are generally presumed correct unless they are rebutted by clear and convincing evidence or based on an unreasonable evidentiary foundation (Sections 2254(e)(1) and (d)(2); *Gonzales v. Pliler*, 341 F.3d 897, 903 (9th Cir. 2003)). But with the state court having refused Nunes an evidentiary hearing, we need not of course defer to the state court's factual findings—if that is indeed how those stated findings should be characterized—when they were made without such a hearing (*Killian v. Poole*, 282 F.3d 1204, 1208 (9th Cir. 2002); *Weaver v. Thompson*, 197 F.3d 359, 363 (9th Cir. 1999)).[7]

[7] While there may be instances where the state court can determine without a hearing that a criminal defendant's allegations are entirely without credibility or that the allegations would not justify relief even if proved, that was certainly not the case here (*see United States v. Navarro-Garcia*, 926 F.2d 818, 822 (9th Cir. 1991)). It cannot fairly be said that Nunes' failure to have approached the trial judge independently with his concerns over the plea bargaining process leads to the conclusion that he would not have accepted the plea offer had

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7. It is particularly unacceptable for that court to have eschewed an evidentiary hearing on the basis that it was accepting Nunes' version of the facts, then to have given the lie to that rationale by discrediting Nunes' credibility and rejecting his assertions.

he actually received it. To the contrary, it would be unreasonable to require Nunes to have confronted the trial judge on his own to preserve his right to assistance of counsel, when he was after all being represented by a lawyer on whom he was relying to protect his rights. It must be remembered that, as Nunes testified, he had in fact tried to speak to the judge at some earlier time in the proceedings, at which point the judge chastised him for doing so, instructing him that it was his lawyer's job to speak to the court. (SER 159)

In addition, and quite aside from the state court's departure from its stated acceptance of Nunes' version of the facts, that court's statement that he had failed to show that he would have accepted the plea offer if it had been conveyed to him accurately was an impermissible—and a really speculative—conclusion. It must be remembered that Nunes was approaching his fourth trial on the same crime. Two of the earlier juries were hung in favor of a life sentence, while the third trial resulted in a conviction for second-degree murder that was overturned solely on procedural grounds. Nunes' strategy at trial had always been to argue that he was guilty of voluntary manslaughter—how then can it be thought that he would prefer risking a guilty verdict on second-degree murder to pleading guilty to voluntary manslaughter? At the very least, it was unreasonable for the state court to have denied Nunes the opportunity for a full and fair hearing on the matter—a hearing later granted by the district court, during which Nunes swore (just as he had stated in his written declaration in the state court proceedings) that he would have accepted the plea offer if it had been accurately conveyed to him, and explained why that was so.

Because the dissent suggests otherwise, we stress that we do not hold (or even hint) that the state court erred because it evaluated the facts differently than we would have or because it arrived at a different result. Instead the state court's decision was objectively unreasonable because that court made factual findings (that is, it drew inferences against Nunes where equally valid inferences could have been made in his favor, and it made credibility determinations) when it rather claimed to be determining prima facie sufficiency. By contrast, if the state

court had first conducted an evidentiary hearing and had then arrived at the same inferences and credibility determinations, we would not be second-guessing those procedures and results as objectively unreasonable.

[8] Viewed either as a finding of fact or as a determination of law, then, the state court's determination was objectively unreasonable. Nunes had adduced sufficient evidence to support his allegations that his attorney failed to convey the correct plea bargain and that he suffered prejudice as a result. And because Mueller does not challenge on appeal either the federal district court's decision to grant an evidentiary hearing in this Section 2254 proceeding[8] or the district court's factual findings after having done so, we affirm the district court's determination that Nunes is entitled to habeas relief for his ineffective assistance of counsel claim.

APPROPRIATE REMEDY

Mueller further argues that the district court did not have the authority to order specific performance of the original plea offer. He urges that specific performance is available only where the prosecution has abused its discretion (*see*

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8. Section 2254(e)(2) provides that a habeas petitioner that has "failed to develop the factual basis of a claim in State court proceeding" is not entitled to an evidentiary hearing in federal court except in the circumstances provided in the statute. As *Belmontes v. Woodford*, 335 F.3d 1024, 1053-54 (9th Cir. 2003), citing *Williams v. Taylor*, 529 U.S. 420, 429-37 (2000) states:

> A habeas petitioner must meet two conditions to be entitled to an evidentiary hearing: He must (1) allege facts which, if proven, would entitle him to relief, and (2) show that he did not receive a full and fair hearing in a state court, either at the time of the trial or in a collateral proceeding.

Because Mueller does not contend that Nunes actually received a full and fair hearing on his claim or that he failed to develop the factual basis of his claim in state court, we need not explore that issue further.

Bordenkircher v. Hayes, 434 U.S. 357, 364 (1978)) or where the prosecution breaches its plea agreement (*Mabry v. Johnson*, 467 U.S. 504, 510 n. 11 (1984)). According to Mueller, permitting such orders in other instances would run afoul of abstention principles that generally bar federal interference with state criminal proceedings (*Moore v. Sims*, 442 U.S. 415, 424 (1979); *Younger v. Harris*, 401 U.S. 37, 49 (1971)).

But any such issues can be avoided by the simple expedient of modifying the writ to order Nunes' release (that is, after all, the classic relief afforded by the writ) within a reasonable time unless the state provides the identical offer it made to Nunes earlier. As *Hilton v. Braunskill*, 481 U.S. 770, 775 (1987) teaches:

> Federal habeas practice, as reflected by the decisions of this Court, indicates that a court has broad discretion in conditioning a judgment granting habeas relief. Federal habeas courts are authorized, under 28 U.S.C. §2243, to dispose of habeas corpus matters "as law and justice require." In construing §2243 and its predecessors, this Court has repeatedly stated that federal courts may delay the release of a successful habeas petitioner in order to provide the State an opportunity to correct the constitutional violation found by the court.

See also the discussion of conditional writs in *McQuillion v. Duncan*, 253 F.Supp.2d 1131, 1134 (C.D.Cal. 2003). That obviates the concerns that Mueller raises and is "tailored to the injury suffered from the constitutional violation" without "unnecessarily infring[ing] on competing interests" (*United States v. Morrison*, 449 U.S. 361, 364 (1981). And it conforms to the Section 2243 directive that the federal habeas court shall "dispose of the matter as law and justice require."

[9] Conceptually, any habeas remedy "should put the defendant back in the position he would have been in if the Sixth Amendment violation never occurred," and in some circumstances granting a new trial is not the appropriate remedy to that end (*Blaylock*, 20 F.3d at 1468). Here as in *Blaylock* the

ineffective assistance occurred before trial, and "the harm consisted in defense counsel's failure 'to communicate a plea offer to defendant'" (*id.*). Under such circumstances the constitutional infirmity would justify Nunes' release, but if the state puts him in the same position he would have been in had he received effective counsel, that would cure the constitutional error (*see Phifer v. Warden, United States Penitentiary*, 53 F.3d 859, 864-65 (7th Cir. 1995)).[9]

CONCLUSION

Because we agree with the district court that the state court's decision was an unreasonable application of clearly established Supreme Court law and an unreasonable determination of the facts in light of the evidence before the state court, we AFFIRM the district court's decision to grant Nunes' Section 2254 petition because of the ineffective assistance of counsel during the plea bargaining process. We REMAND to the district court with directions to modify its order so as to direct the state to release Nunes within 120 days unless it offers Nunes the same material terms that were contained in its original plea offer. Any further proceedings shall be consistent with this opinion.

GRABER, Circuit Judge, dissenting:

I respectfully dissent.

Federal habeas corpus relief is available to Petitioner only if the state court's "adjudication of [his] claim resulted in a decision that was contrary to, [[10]] or involved an unreasonable

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9. It might perhaps be contended that because Nunes had never actually accepted the terms of the original plea offer, we cannot enforce it as a binding contract. While it is true that contract law generally guides the enforcement of plea bargains (*United States v. Sar-Avi*, 255 F.3d 1163, 1166 (9th Cir. 2001), the remedy we provide stems from Section 2243 and not from contract law.

10. I agree with the majority that this case does not involve the "contrary to" prong of 28 U.S.C. § 2254(d)(1). (Maj. op. at 16833.)

application of, clearly established Federal law, as determined by the Supreme Court of the United States," 28 U.S.C. § 2254(d)(1), or "was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding," *id.* § 2254(d)(2). In this case, the facts on which the state court relied to hold that Petitioner failed to make out a prima facie case of prejudice are supported by the record, and the prejudice analysis that the state court applied—*In re Alvernaz*, 830 P.2d 747, 756 (Cal.1992)—is consistent with *Strickland v. Washington*, 466 U.S. 668 (1984). Therefore, we may grant relief only if the state court's application of *Alvernaz* to the facts before it was objectively unreasonable. It was not.

Petitioner claims ineffective assistance of counsel in failing to communicate a plea bargain accurately.[11/] The majority properly identifies *Strickland* as the governing law for that claim. (Maj. op. at 16834-35.) Prejudice is an essential element of a *Strickland* claim. 466 U.S. at 694.

The state court assessed Petitioner's claim under the prejudice analysis of *Alvernaz*—a framework that the majority agrees is not contrary to clearly established Supreme Court law. (Maj. op. at 16833-34.) Under *Alvernaz*, a defendant's own assertion in hindsight that he would have accepted a plea bargain is insufficient to prove prejudice; prejudice must be shown by objective corroborating evidence. 830 P.2d at 756. Thus, to make out a legally sufficient prima facie case of prejudice under *Alvernaz*, Petitioner had to present some objective corroborating evidence.

The majority holds that "it was objectively unreasonable for the state court to conclude on the record before it that no reasonable factfinder could believe that Nunes had been prejudiced." (Maj. op. at 16835.) With respect, that is not the question before us. The state court applied *Alvernaz*, which is not contrary to *Strickland* and which requires objective corroborating evidence before the right to a hearing attaches.

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11. I agree with the majority's analysis of the right to counsel during plea bargaining. (Maj. op. at 16830-33.)

The question, then, is whether it was objectively unreasonable for the state court to conclude on the record before it that Petitioner had failed to offer objective corroborating evidence in support of his assertion that he would have taken the plea at the time it was offered, had it been properly communicated.

It was not objectively unreasonable for the state court to conclude that the evidence Petitioner had presented failed to establish a prima facie case under *Alvernaz*. As a factual matter, the state court *assumed* (1) that Petitioner's trial lawyer did not accurately communicate the plea offer or competently advise him and (2) that Petitioner truthfully asserted that he would have taken the plea at the time it was offered, had it been properly communicated. However, the latter assumption did not avail Petitioner under the *Alvernaz* test; even assuming Petitioner's utter sincerity, California Supreme Court precedent prevented the California Court of Appeal from relying solely on Petitioner's own after-the-fact statement that he would have taken the plea bargain.

Petitioner's remaining evidence,[12] taken in Petitioner's favor, established (1) that before trial, his mother told him that the plea offer was better than he thought after talking to his lawyer; (2) that, although he saw his lawyer before and during trial, his lawyer's incompetence made it difficult or impossible to communicate his concerns about the plea offer; and (3) that he had escaped a murder conviction three times already after three earlier trials.

The state appellate court found that the foregoing facts did not establish objective, corroborating evidence that Petitioner would have taken the plea offer. The court reasoned that, because Petitioner knew that the terms of the plea offer were different from those his counsel had reported, but did not seek

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12. Petitioner presented three declarations to the state court. They were from him, his mother, and his appellate counsel. His later-proffered declarations and other documents, which the state court rejected, did not supply objective corroboration of Petitioner's willingness to accept a plea offer. The state court also reviewed the trial transcript of the fourth trial.

clarification of the plea offer when he saw his counsel before trial,[13] he had failed to establish a reasonable probability that, with effective representation, he would have accepted the proffered plea bargain. The court also reasoned that the plea offer of eleven years was not a patently preferable choice, given that Petitioner had escaped conviction on the murder charge three times and could hope for a voluntary manslaughter sentence of six years. Consequently, the state court concluded, Petitioner failed to demonstrate a prima facie case of prejudice by objective corroborating evidence.

The majority and the district court draw different, and perhaps more convincing, inferences from the facts that were before the state court. But a strong alternative analysis does not make the state court's inferences and analysis objectively unreasonable. Our sole task is to determine whether the state court's decision that the facts, taken in Petitioner's favor did not meet the *Alvernaz* threshold for objective corroboration was objectively unreasonable under *Strickland*. *See Wiggins v. Smith*, 123 S.Ct. 2527, 2535 (2003) (holding that the question for a federal habeas court is whether the state court's decision was "objectively unreasonable"). Indeed, as the United States Supreme Court recently held, "[w]e may not grant [a] habeas petition . . . if the state court simply erred in concluding that the State's errors were harmless; rather, habeas relief is appropriate only if the [state court] applied harmless-error review in an 'objectively unreasonable' manner." *Mitchell v. Esparza*, 124 S.Ct. 7, 12 (2003) (per curiam).

It simply was not objectively unreasonable for the state court to conclude that the facts Petitioner presented did not amount to objective, corroborating evidence. It *would* have been objectively unreasonable if, for instance, Petitioner's mother in her declaration had sworn that Petitioner told her—at the time

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13. The state court did not discuss whether the plea offer had expired by the time Petitioner saw his counsel before trial began. However, that court's narrow point was that Petitioner's silence implied consent to proceed to trial—not that Petitioner's hypothetical protest necessarily would have enabled his counsel to secure a revival of the offer.

he learned of the eleven-year plea offer—that he wanted to take it. Petitioner offered nothing of the sort. Therefore, I simply cannot say that the state court was objectively unreasonable in deciding that Petitioner did not present objective, corroborating evidence sufficient to make out a prima facie claim of prejudice.

Although it may appear that the majority and I differ only in how we read the record or the state appellate court's opinion, our disagreement also is more fundamental. In this case, a state's highest court has established evidentiary requirements for a claim of ineffective assistance of counsel that are more stringent than those established in *Strickland* or in other Supreme court cases. The majority comments, fairly, that those evidentiary requirements are "in substantial tension" with *Strickland*, maj. op. at 16835 n. 6, but as all of us conclude the requirements are not "contrary to" clearly established Supreme Court precedent, *id.* at 16833. I also believe that *Alvernaz* is not an objectively unreasonable application of *Strickland*. In that situation, I believe that 28 U.S.C. § 2254(d) and the Supreme Court's recent interpretations of it, such as the cases cited above and *Yarborough v. Gentry*, 124 S.Ct. 1 (2003) (per curiam), require us to allow the state to apply its higher evidentiary standard.

Two final points: First, the majority's assertion that the state court's decision should be viewed, in the alternative, as a factual determination (maj. op. at 16835-36) misapprehends what that court held. The state court held as a matter of law that the facts, taken in Petitioner's favor, did not meet the *Alvernaz* threshold for objective corroboration of Petitioner's claim that he would have taken the plea offer had his counsel communicated it to him accurately at the time. To the extent that the state court relied on facts, the key facts on which it relied are entitled to a presumption of correctness under 28 U.S.C. § 2254(d)(2) and (e)(1), and none was contradicted in the later federal hearing.[14/]

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14. Thus the majority's reliance (maj. op. at 16835-36) on *Killian v. Poole*, 282 F.3d 1204 (9th Cir. 2002), *cert. denied*, 123 S.Ct. 992 (2003), and *Weaver v. Thompson*, 197 F.3d 359 (9th Cir. 1999), is misplaced even if factual findings are involved here. *Killian* involved a situation in which

Second, the majority faults the state court for denying Petitioner a hearing to develop additional objective corroboration for his claim. (Maj. op. at 16834-36.) Under our AEDPA standard of review, this criticism is relevant only if (1) clearly established Supreme Court law required a hearing in the circumstances or (2) the facts before the state court were unreasonably determined or insufficient to support an objectively reasonable decision that Petitioner had failed to make out a prima facie case.

Here, as to the first option, the state court's failure to hold a hearing did not violate clearly established Supreme Court precedent. As to the second option, the state court based its decision on (1) Petitioner's failure to exploit an opportunity to clarify the plea offer he knew to be different from what his lawyer had told him and (2) the potential benefits of proceeding to trial, as they then appeared. Support for those key facts existed in the record, and the state court did not exceed the bounds of objective reasonableness in concluding that there was insufficient objective corroboration to trigger further inquiry.

For the foregoing reasons, I would reverse the district court's order granting habeas corpus relief. I must therefore dissent from the majority's holding to the contrary.

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no adjudication on the merits in state court was possible, 282 F.3d at 1208, whereas here the state court had the opportunity and the obligation to decide whether Petitioner had made out a prima facie case. *Weaver* involved a situation in which a trial judge wrote an informal letter but made no formal factual determination, 197 F.3d at 363, whereas here the state court's determination that Petitioner had not made out a prima facie case was contained in a formal decision. *See also Valdez v. Cockrell*, 274 F.3d 941, 951 (5th Cir. 2001) (holding that AEDPA deference applies to state-court findings of fact based on a review of the record), *cert. denied*, 537 U.S. 883 (2002).

EXHIBIT B

Filed November 20, 2002

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF CALIFORNIA

JEFFREY WELTON NUNES
Petitioner

v.

G.A. MUELLER, Warden
Respondent

No. CIV S-98-0106 LKK JFM P

FINDINGS AND RECOMMENDATIONS

Petitioner is a state prisoner proceeding through counsel with an application for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Petitioner raises seven claims in his April 16, 1999 Second Amended Petition: 1) Petitioner was denied due process when the state court of appeal considering his habeas petition relied on a false hearsay declaration from respondents' counsel describing a conversation with petitioner's trial counsel, Michael Brady, about the contents of a plea offer, without allowing petitioner to examine counsel on the false statements; 2) Petitioner received ineffective assistance of trial counsel because trial counsel failed to inform petitioner of the correct terms of a plea offer from the prosecution, in violation of petitioner's rights under the Sixth and Fourteenth Amendments to the U.S. Constitution; 3) Petitioner received ineffective assistance of appellant counsel; 4) the evidence was uncontroverted that petitioner shot the victim as the consequence of a sudden quarrel or heat of passion based on adequate provocation; thus petitioner's conviction of murder violates petitioner's rights under the due process clause of the Fifth and Fourteenth Amendments; 5) Petitioner's due process rights under the Fifth and Fourteenth Amendments were

violated when the prosecutor engaged in misconduct in his closing argument; 6) The trial court erred in instructing the jury that voluntary intoxication is not a defense to a crime without explaining that this rule did not apply to specific intent or malice; and 7) Trial counsel was ineffective in failing to request that the jury be instructed that legally adequate provocation could occur over a considerable period of time.

On March 23, 2001, this court held an evidentiary hearing on petitioner's first, second and seventh claims for relief regarding ineffective assistance of counsel. The court heard testimony from petitioner, his trial counsel and his mother, and from respondents' witness, Harry S. Kinnicutt, the prosecutor of each of petitioner's jury trials

FACTUAL AND PROCEDURAL BACKGROUND[1/]

> On April 28, 1989, [petitioner] was charged in Solano County with one count of murder (Pen. Code, § 197, subd. (a)), (footnote omitted) and three counts of assault with a firearm (§ 245, subd. (a)(2)). It was alleged as to each count that [petitioner] personally used a firearm within the meaning of [Penal Code] sections 12022.5 and 1203.06.
>
> [Petitioner's] first jury trial in 1989 resulted in a mistrial due to a hung jury on the murder charge. The jury did find him guilty of one count of assault with a firearm, with personal use of a firearm, and with two counts of the lesser misdemeanor offense of exhibiting a firearm ([Penal Code §] 417). He was retried on the murder count in 1990. This trial also ended in a mistrial due to a hung jury, although the jury did issue a partial verdict that [petitioner] was not guilty of first degree murder.
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> In 1991, [following a third jury trial], [petitioner] was

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1. This information is drawn from the opinion of the Court of Appeal for the State of California, First Appellate District, Division Two, filed October 8, 1996. The People v. Jeffrey Welton Nunes, Nos. A063524 and A068851 (October 8, 1996), slip op. at 2-9.

convicted . . . of second decree murder and the firearm use enhancement was found true. On appeal, . . . the conviction [was reversed because] . . . the trial court committed reversible error by speaking to the jury during deliberations outside the presence of [petitioner] and his counsel. (*People v. Nunes (Nunes I)* (A055947) January 21, 1993, p. 19.) The judgment on the other counts was affirmed. (*Ibid.*)

[Petitioner's] fourth trial on the murder charge began on August 3, 1993. The following evidence was presented at that trial.

Prosecution Case

Emily Prien (formerly Nunes) and [petitioner] married in 1984 and had two children during their marriage. In 1986, Prien initiated a five or six month separation, although the couple subsequently reconciled. [Petitioner] was extremely distressed about he separation, and was hospitalized at least once at Napa State Hospital.

During their marriage, particularly after the 1986 separation, [petitioner] drank heavily, usually consuming a six-pack or more of beer each day. He was jealous and possessive with Prien, and would not let her go places alone or with her girlfriends.

In early October 1988, Prien asked [petitioner] to move out of their apartment in Suisun City because she needed time to herself. [Petitioner] was extremely upset about the separation. She never told him she wanted a divorce until she served the papers on him when he was in jail following the commission of the acts in question. Without informing [petitioner], Prien took [petitioner's] name off the lease and changed the lock on the front door. During the separation, [petitioner] and Prien spoke on the phone and saw each other occasionally; [petitioner] confronted her several times about going out, particularly to bars.

On November 12, 1988, Prien went to a holiday party at the Holiday Inn in Fairfield sponsored by her employer, Mervyn's Department Store. Prien arranged for the children to spend the night at her mother's house and went to the party at about 7:30 p.m. with her good friend, Kimberly Fure. After the party, Prien drove to Chauncy's bar with Fure and another coworker, Donald Gonsalves. Prien had known Gonsalves for about six months; they had never dated. At Chauncy's, she socialized with several other Mervyn's employees, as well as with a man named Tom Garant.

At about 1 a.m., [petitioner] walked into Chauncy's. Prien knew he had been away on a hunting trip, and had thought he would be away all weekend. [Petitioner] looked around for Prien, but did not see her and left. Prien was concerned that [petitioner] was going to let the air out of her car's tires, as he had done a couple of weeks earlier. While Prien remained in the bar, Fure, Gonsalves, and Garant went outside to check on her car. They found [petitioner] releasing the air from Prien's tires and told him to stop. [Petitioner] got in his car and drove away.

Prien and her friends then continued socializing at the bar until it closed at about 1 or 2 a.m. After stopping to fill the deflated tire on her car with air, Prien, Gonsalves, Fure, Garant, and two other friends went to Prien's apartment. Garant and Fure fell asleep on the living room couch and two other friends soon left. At about 3 a.m., [petitioner] called Prien, asking if she had been going to bars and calling her names. When Prien hung up on him, [petitioner] left at least one angry message on her answering machine; Prien then took the phone off the hook.

Gonsalves, who did not have a car, asked Prien for a ride home. Prien suggested driving him home in the morning on her way to work, and he agreed. Prien told him he could sleep on the king-size waterbed in her bedroom. She went into the bathroom and changed into a bathrobe.

When she came out of the bathroom, Gonsalves was already asleep on one side of the bed; she went to sleep in her robe on the other side.

At about 4:30 a.m., Garant was awakened by the sound of someone pounding on the front door, yelling, and breaking a window in the apartment. When Garant asked who was there, [petitioner] answered; "This is Emily's husband. Open the fucking door." Garant opened the door; [petitioner] had a gun in one hand and a beer in the other. According to Garant, [petitioner] put the gun about three inches from Garant's head. Garant crouched and went toward Fure to wake her up, yelling: "don't shoot. Don't shoot. I'm with her." As Fure woke up, [petitioner] yelled to "get the fuck out." [Petitioner] was waving the gun around as he spoke.

Prien, awakened by the sound of breaking glass, went into the living room and saw [petitioner] with the gun shouting at Fure and Garant to get out. Gonsalves was still asleep. As Garant and Fure ran out of the apartment, [petitioner] and Prien yelled at each other and [petitioner] fired a shot into the ceiling. Neither Garant nor Fure had trouble understanding [petitioner], whose speech was not slurred. He appeared to Garant to be in control of himself. Fure and Garant left in Garant's car and went to look for a phone to call the police.

Prien demanded that [petitioner] leave. He asked if the reason she wanted him to leave was because someone was there, which Prien denied.[2/] [Petitioner] then pushed her aside to go down the hall to the bedroom. As he did so, Prien's robe came open and [petitioner] saw that she was nude underneath.. Her normal habit was to wear a nightgown to sleep. [Petitioner] went into the bedroom, turned on the light, and shot Gonsalves. Prien did not see what Gonsalves was doing when he was shot. [Petitioner]

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2. In her prior testimony, in August 1991, Prien did not testify about this dialogue between herself and [petitioner].

then said: "Oh my God, I've just shot somebody. I think I'm in trouble." [Petitioner] had been angry and upset until then, but became scared after the shooting. Prien told [petitioner] to say in the apartment while she called the police, but he pushed her aside and left. Prien then called 911.

During the entire time [petitioner] was at the apartment, Prien did not see him put the gun to his head or threaten suicide. Neither Fure nor Garant heard [petitioner] threaten suicide or saw him put the gun to his head.

Suisun city police officer Susan Lobao arrived at Prien's apartment at 5:02 a.m. Prien was hysterical and Gonsalves lay with his head in a pool of blood on the floor by the doorway of the bedroom. He was wearing a tank top and underwear. Prien told Lobao that her husband had shot Gonsalves. [Petitioner] was arrested that morning at the home of his mother. Police also seized a revolver from [petitioner's] mother's house. He showed no outward signs of being under the influence of alcohol or drugs. [Petitioner's] blood was drawn at about 6:23 a.m.; an analysis of the blood sample showed a blood alcohol level of .14 percent. A subsequent breathalyzer test showed [petitioner] had a .11 percent blood alcohol level.

William Robertson. a criminalist, testified that a long-time drinker with a .14 percent blood alcohol level[3/] may lose his moral inhibitions and disregard the consequences of his acts up to a point, but that he would still know what he was doing. He would certainly be able to recognize what firing a bullet into a human being could do, and would appreciate the need to flee once he killed someone.

Dr. Arnold Josselson, a pathologist, testified that he performed an autopsy on Gonsalves and found gunshot wounds to the face, the right shoulder and the left thigh.

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3. Robertson acknowledge that [petitioner's] blood alcohol level could have been as high as .17 percent when he shot Gonsalves.

The weapon had been held at least two to three feet from Gonsalves. The bullet wound to the thigh had traveled up into the abdomen and caused Gonsalves to bleed to death. Because of the upward path of the bullet, Dr. Josselson concluded that the thigh wound was inflicted while Gonsalves was either seated or lying down. Gonsalves would have been able to stand up after being shot in the thigh.

Defense Case

[Petitioner] testified on his own behalf. He stated that during the 1986 separation, he was very confused and sad, and became a heavy drinker. He called the Fairfield Crisis Center at his mother's suggestion; when he told the counselor there that he thought of killing himself, he was involuntarily committed to Napa State Hospital for three days. Later, he was again involuntarily committed for two days after trying to overdose on pills. In January 1987, after [petitioner] and Prien reconciled, Prien told [petitioner] she was pregnant by another man and was going to have an abortion. After he went to Missouri for military basic training, Prien sent him a letter saying she was not pregnant after all. Soon thereafter, she again wrote to inform him that she was pregnant with his child. [Petitioner] was confused and never fully reconciled to her contradictory statements about who fathered their second child.

In early October 1988, Prien told [petitioner] she was not happy and asked him to give her some space, and he went to stay at a friend's house. Prien did not say she wanted a divorce, but [petitioner] suspected that was her plan. During their separation, [petitioner] learned that Prien was frequently going out at night. Petitioner, who admitted he was a jealous and possessive person, was upset that Prien had lied to him about wanting time alone with the children.

On November 12, 1988, [petitioner] went on a hunting trip, as he had told Prien he planned to do. He drank beer

that day and when he returned from the trip that evening, he was feeling depressed about his marital problems. He went to a bar with a friend and continued to drink. At about midnight, on his way to the house where he was staying, [petitioner] stopped at Chauncy's bar to see if his cousin Dave was there. He was upset when he saw Prien's car in the parking lot because she had said she was not doing anything that weekend. He went inside Chauncy's but did not see Prien there; he did see her friend, Kim Fure. He went outside and began to release the air from one of Prien's car tires. Fure came out accompanied by two men and confronted [petitioner]. He asked Fure to have Prien come outside and talk to him, but Fure refused.

[Petitioner] then returned to his friend's house where he was joined by his cousin Dave. They drank beer and shot pool. Afer Dave fell asleep, [petitioner] continued to feel upset with Prien; he called her and cursed at her over the phone, calling her a slut and a whore. After she hung up on him, he left similar messages on her answering machine. He then called his mother, who suggested he call the Crisis Center and seek counseling. [Petitioner] did not do so because he feared being sent back to Napa State Hospital for treatment. Finally, [petitioner] took his revolver and drove to Prien's apartment, where he intended to threaten to kill himself in front of her to try to get some sympathy. He did not take the gun to shoot another person, nor did he know if anyone else was at the apartment.

When [petitioner] discovered that his key no longer worked in the apartment's front door, he became angry and started banging on the door. When no one responded right away, he thought everyone was "still partying" inside, which made him even angrier. [Petitioner] banged on the window until it broke. He was very angry to see Fure and Garant on the couch "half naked." Once inside, [petitioner] waved his gun in the air and yelled at Fure and Garant to get "the hell out" of his house. As Fure and Garant left, Prien came out and began arguing with

[petitioner]. [Petitioner] told her that her running around and lying to him were driving him to suicide. He pointed the revolver at his head, but she did not appear to care. She just kept screaming at him about the window. To show how distressed he was, [petitioner] aimed his gun at the ceiling and fired a shot. He then cocked the gun again and pointed it at his head.

[Petitioner] and Prien continued to argue. suddenly, she grew quiet as if she heard something. [Petitioner] asked her if someone else was in the house, and she said no, and told him to get out. She then rushed toward him and bumped into him, causing her bathrobe to fly open. [Petitioner] saw that she was nude underneath and this made him very suspicious because he knew that she always slept in a nightgown.

[Petitioner] went down the hallway into the bedroom where he turned on the light and saw Gonsalves under the sheets. Feeling hurt and betrayed, [petitioner] screamed and cried. The man "jumped up and started coming at" [petitioner.] He shot Gonsalves in a "panic reaction"; he had no intention to shoot or kill him. He could not recall pulling the trigger, and could only remember seeing "a bunch of flashes," which he realized had to be from his gun. After the shooting, [petitioner] felt scared and said: "oh my God, I think I'm in trouble." He fled the apartment and drove to his mother's house, intending to commit suicide, but his mother stopped him from doing so. At this mother's request, he gave her the revolver and waited until she called the police.

On cross-examination, [petitioner] testified that he had fired the revolver he used to shoot Gonsalves several hundred times before and had fired thousands of rounds in his life. He owned four handguns and five rifles and had been trained both in the miliary and on his own how to fire weapons. He also claimed that when he killed Gonsalves, he was in fear for his life because Gonsalves was "charging" him, although he later acknowledged that it

was possible that Gonsalves was lying in the bed when [petitioner] shot him. He did not even know he was shooting because he was "looking through tears" and everything was blurred. He ran from the apartment because Gonsalves was still coming at him. [Petitioner] was not sure whether or how badly Gonsalves had been hurt.

[Petitioner] admitted that when he called his mother at 4:15 a.m., about 45 minutes before the shooting, he told her he suspected Prien was "screwing around on me again."

Dr. Luigi Piciucco, a clinical psychologist also testified for the defense. After interviewing [petitioner], reviewing his family history, and conducting several psychological tests on him, Dr. Piciucco concluded that [petitioner] suffered from major depression, was dependent on alcohol, and had a mixed personality disorder. [Petitioner] had low self-esteem and was "more likely to become suicidal than to direct his aggression in an outward manner" when he was depressed.

Police officer Anthony Welch testified on cross-examination during the prosecution's case that the position of the empty shells and one live round in [petitioner's] gun was consistent with someone cocking the weapon and placing it to his head, firing one round at the ceiling, cocking it again and placing it to his head, releasing it without discharging a round, and then firing three rounds at Gonsalves.

The jury found [petitioner] guilty of second degree murder and found the firearm enhancement to be true. On September 20, 1993, the trial court sentenced [petitioner] to 15 years to life for second degree murder and 2 years for the firearm use enhancement. The court also sentenced [petitioner] to a concurrent term of three years on count two and suspended the sentence on counts three and four.

> [Petitioner] filed a timely appeal and a petition for writ of habeas corpus. On February 17, 1995, [the court of appeal] ordered that the writ petition would be considered with the appeal.

(People v. Nunes, Nos. A063524 and A068851, slip op. at 2-9.)

ANALYSIS

I. General Standards

Federal habeas corpus relief is not available for any claim decided on the merits in state court proceedings unless the state court's adjudication of the claim:

> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d).

Section 2254(d)(2) applies only to factual determinations, while section 2254(d)(1) applies to questions of law and mixed questions of law and fact. Van Tran v. Lindsey, 212 F.3d 1143, 1150 (9th Cir.2000). Petitioner's claims of ineffective assistance of counsel present mixed questions of law and fact and are governed by the standards in § 2254(d)(1). Id. at 1149-50.

"A state court decision is 'contrary to' federal law if it 'failed to apply the correct controlling authority from the Supreme Court.'" Avila v. Galaza, 297 F.3d 911, 918 (9th Cir. 2002) (quoting Shackleford v. Hubbard, 234 F.3d 1072, 1077 (9th Cir.2000), cert. denied, 122 S.Ct. 324 (2001); also citing Williams v. Taylor, 529 U.S. 362, 405-07, 120 S.Ct. 1495 (2000)).

A state court decision involves an "unreasonable application" of federal law "when the state court's application of clearly established federal law is 'objectively unreasonable.'" Shackleford, 234 F.3d at 1077 (citing Williams, 120 S.Ct. at 1521). A state court's application of federal law is "objectively unreasonable" when it is "clearly erroneous," that is, where the federal court is "left 'with a "firm conviction" that one answer, the one rejected by the [state] court, was correct and the other, the application of the federal law that the [state] court adopted, was erroneous. . . .'" Shackleford, id. (quoting Van Tran, 212 F.3d at 1152-54.

The court looks to the last reasoned state court decision as the basis for the state court judgment. Avila, 297 F.3d at 918; see also Packer v. Hill, 291 F.3d 569, 478 (9th Cir. 2002). The court considers first whether the state court decision was erroneous. Van Tran, 212 F.3d at 1155. If the court finds error, it then considers whether the error violates the standards set forth in § 2254(d)(1). See id. Where there is no reasoned state court decision, the federal court conducts an independent review of the record to determine whether the state court erred in its application of federal law. See Delgado v. Lewis, 223 F.3d 976, 982 (9th Cir.2000).

II. Ineffective Assistance of Counsel

In order to prevail on his claim of ineffective assistance of counsel, petitioner must show two things, an unreasonable error and prejudice flowing from that error. First petitioner must show that, considering all the circumstances, counsel's performance fell below an objective standard of reasonableness. Strickland v. Washington, 466 U.S. 688 (1984). The court must determine whether in light of all the circumstances, the identified acts or omissions were outside the wide range of professional competent assistance. Id. at 690. "Review of counsel's performance is highly deferential and there is a strong presumption that counsel's conduct fell within the wide range of reasonable representation." United States v. Fereira-Alameda, 815 F.2d 1251 (9th Cir.1986).

Second, petitioner must prove prejudice. Strickland at 693. to demonstrate prejudice, petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id. The focus of the prejudice analysis is on "whether counsel's deficient performance renders the result of the trial unreliable or the proceeding fundamentally unfair." Lockhart v. Fretwell, 506 U.S. 364, 372 (1993).

a. Hearsay Declaration

Petitioner's first claim for relief is that he was denied due process when the state court of appeal considering his habeas petition relief on a hearsay declaration filed by respondents' attorney concerning statements made by petitioner's trial counsel, Michael Brady, about the contents of a plea offer, without allowing petitioner to examine trial counsel on those statements.[4/] Respondent contends, inter alia, that the state court did not consider these declarations, first, as to the communication of the plea offer claim:

> In this case, it is not necessary to make the factual determination as to whether trial counsel correctly communicated the terms of the plea agreement because regardless of any deficient performance on counsel's part, [petitioner] has not shown prejudice. Specifically, he has not shown that "but for counsel's deficient performance, the [petitioner] would have accepted the proffered plea bargain. . . ."

(People v. Nunes, Nos. A063524 and A068851, slip op. at 30.)[5/]

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4. The short answer to this claim is that the state court did not hold an evidentiary hearing, and this court did. In the interest of completeness, however, this claim is analyzed as presented by petitioner's counsel. In any event, the claim is moot.

5. In their answer, respondents point out that the Court of Appeal

Second, as to the jury instruction concerning provocation:

> Even if counsel's representation was deficient, we will reverse the judgment only if [petitioner] can show prejudice, i.e. that absent counsel's failings, a more favorable result would have been probable. (*People v. Cummings, supra,* 4 Cal.4th at p. 1339, citing *Strickland v. Washington, supra,* 466 U.S. at p. 687.) We find no prejudice in this case since, assuming arguendo that counsel should have requested the optional *Wharton* language, there was, as in *Wharton*, 'evidence before the jury showing provocation occurring over a period of time and no instruction precluding the jury from giving that evidence its due weight.' (*Id.* at p. 572.) In addition, defense counsel emphasized in closing argument that the period of provocation was considerable. . . . [¶] Accordingly, since [petitioner] has not shown prejudice, that is, that absent counsel's failings a more favorable result would have been probable, his ineffective assistance of counsel claim must fail.

(Id. at 27.) Respondents did not address this issue in the context of the alleged prosecutorial misconduct during closing argument claim.

In the traverse, petitioner alleges that the Court of Appeal referenced the hearsay statements of petitioner's trial counsel with regard to three separate claims: i. Defense counsel's failure to communicate the terms of a plea bargain offer; ii. Defense counsel's failure to request a key, relevant jury instruction; and iii. The prosecutorial misconduct during closing argument. (Traverse at 4.) Petitioner concedes that the Court of Appeal stated "[e]ven assuming his factual allegations

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noted both sides had submitted declarations stating they spoke with petitioner's trial counsel. (Mem. of P's and A's at 25.) Petitioner, his mother, and petitioner's appellate attorney filed declarations referencing their discussions with Mr. Brady primarily in the plea bargain context. (Answer, Ex. E., attached as Exs. A-C to the Petition for Writ of Habeas Corpus filed in state court.

to be true, [petitioner] has not demonstrated that he received constitutionally inadequate representation in the plea bargaining process." (Traverse at 4.) However, petitioner points out that the Court of Appeal did not express that observation with respect to the jury instruction concerning provocation or the prosecutorial misconduct claims. (Id.) Thus, petitioner contends, the Court of Appeal "relied upon the truth of defense counsel's second-hand hearsay statement. By resolving these conflicting facts an credibility in this manner, the court denied petitioner due process." (Id.)

The declaration of Violet M. Lee, Deputy Attorney General, referenced by the Court of Appeal, stated as follows:

I, Violet M. Lee, declare as follows:

1. On April 22, 1996, I spoke on the telephone to Michael K. Brady, the attorney who represented petitioner Jeffrey Welton Nunes at all four murder trials (Solano County Superior Court No. 26360). Mr. Brady made the following representations to me:

2. Before the fourth trial began, Deputy District Attorney Harry Kinnicutt offered petitioner an 11-year prison sentence with waiver of all presentence credit in exchange for a guilty plea to voluntary manslaughter.

3. Mr. Brady communicated this offer and its precise terms to petitioner;

4. Mr. Brady advised petitioner that he would likely serve a total of 18 to 22 years in prison if he were convicted of second degree murder and Mr. Brady encouraged him to accept the offer;

5. Petitioner refused to accept the offer of an 11-year term with waiver of all presentence credit and, instead, chose to proceed to trial;

6. Mr. Brady made the tactical decision not to object to the

prosecutor's argument quoted at pages 7-9 of the habeas petition because Mr. Brady believed that an objection would have done nothing more than prompt the trial court to caution the jury to follow the instructions on the law as given by the court.

7. Mr. Brady did not request that CALJIC No. 8.42 be modified to include language informing the jury that legally adequate provocation could occur over a considerable period of time because Mr. Brady argued this point to the jury in his closing argument and the prosecutor did not raise this as an issue.

8. I prepared a declaration with the statements listed above for Michael K. Brady. On May 14, 1996, he informed he had decided not to sign a declaration.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Francisco, California on May 15, 1996.

Respectfully submitted,
/s/ Violet M. Lee

(Answer, Attachment to Ex. F.)

i. Hearsay Declaration in the Plea Bargain Context

Because the Court of Appeal did not rely on the hearsay declaration with regard to petitioner's claim concerning the plea bargain, petitioner's claim that his due process rights were violated by the court's reference to the hearsay declaration with respect to the plea bargain process should be denied. The merits of the underlying plea bargain claim are discussed infra.

ii. Hearsay Declaration in Jury Instruction Context

Although the Court of Appeal did not expressly state that they did not have to find the factual allegations within the hearsay declaration to be true, the court introduced its finding

with the phrase, "[e]ven if counsel's representation was deficient," giving petitioner the benefit of the doubt, and choosing to rely on the prejudice prong of Strickland. (People v. Nunes, Nos. A063524 and A068851, slip op. at 17; Strickland, 466 U.S. at 697.) The Court of Appeal went on to find that petitioner had failed to prove the prejudice prong of Strickland in this context; petitioner had not demonstrated that "absent counsel's failings a more favorable result would have been probable." (People v Nunes, Nos. A063524 and A068851, slip op. at 17; Strickland, 466 U.S. at 693-94.) The Court of Appeal did not have to rely on the hearsay declaration to analyze the prejudice prong in this context. Thus, this court cannot find that the state court's reference to this hearsay declaration was erroneous, Van Tran, 212 F.3d at 1155, and this claim should be denied. The underlying jury instruction claim is discussed infra.

iii. Hearsay Declaration in Prosecutorial Misconduct Claim

In light of the evidentiary hearing held in this court, this claim appears moot. Petitioner's trial counsel testified that as a general practice, his trial strategy was to refrain from objecting during the prosecutor's closing arguments. (Evidentiary Hearing Transcript ("EHT") at 83-84.) This testimony is in line with that portion of the hearsay declaration recounted by the Court of Appeal in the context of this claim:

> In the circumstances of this case, it appears to have been a perfectly reasonable tactical choice on defense counsel's part to refrain from objecting and drawing further attention to the portion of the prosecutor's argument in question. [Footnote omitted.] (*People v. Frierson, supra,* 5 Cal.3d at p. 158.) This is especially true in light of the fact that the trial court instructed the jury that to the extent arguments by counsel conflicted with its instructions on the law, the jury must follow the instructions.

(People v. Nunes, Nos. A063524 and A068851, slip op. at 17-18.)

A petitioner seeking to prove ineffective assistance of counsel "must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" Strickland, 466 U.S. at 689 (quoting Michel v. Louisiana, 350 U.S. 91, 101, 76 S.Ct. 158, 164, 100 L.Ed. 83 (1955)). Because the Court of Appeal found that the strategy of refraining from objecting during opposing counsel's closing argument was reasonable given the circumstances of this case, and petitioner's defense counsel testified at the evidentiary hearing in this court that this was his practice, this court cannot find that the state court's reference to the hearsay declaration was error. Thus, this claim should also be denied. The underlying prosecutorial misconduct claim is discussed infra.

iv. Due Process Violation

Petitioner contends his due process rights were violated because the Court of Appeal failed to hold an evidentiary hearing to resolve disputed issues of fact. This court finds this contention now moot inasmuch as an evidentiary hearing was held in this court on March 23, 2001 and April 6, 2001. This claim should also be denied.

b. Failure to Accurately Inform Petitioner of Plea Offer

Petitioner's second claim for relief is that Michael Brady rendered ineffective assistance of counsel because he did not accurately inform petitioner of the terms of a plea offer from the prosecutor. Petitioner alleges that had he been correctly informed he would have accepted the plea bargain and pleaded guilty to voluntary manslaughter, which would have reduced his sentence and increased his eligibility for parole.

Respondent contends that the appellate court properly denied this claim because petitioner was unable to prove that he would have taken the plea bargain had it been properly presented to him. Respondent argues that petitioner's mother had informed him of the proper terms of the plea bargain well before trial, thus enabling petitioner to discuss the plea bargain with his attorney or, in the alternative, to seek clarification from

the trial court.

Petitioner counters that he had a constitutional right to participate in the fundamental decision of whether or not to plead guilty, and that he was deprived of that right by his trial counsel's failure to correctly communicate the plea offer. Petitioner contends that an effective criminal defense lawyer would have known that prisoners convicted of second degree murder were not being paroled and that prisoners convicted of manslaughter were being paroled. Because petitioner's trial counsel failed to properly communicate the offer to petitioner, petitioner contends he was deprived of the right to make an informed decision whether to accept the plea bargain that would allow him to be paroled at some time in the future, rather than risk being held in prison forever should he be found guilty of second degree murder.

The California Court of Appeal resolved this claim as follows:

> In this case, it is not necessary to make the factual determination as to whether trial counsel correctly communicated the terms of the plea agreement because regardless of any deficient performance on counsel's part, [petitioner] has not shown prejudice. Specifically, he has not shown that "but for counsels deficient performance, the defendant would have accepted the proffered plea bargain. . . ." (*People v. Snyder, supra,* 14 Cal.App.4th at p. 1176.)
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> "In determining whether a defendant, with effective assistance, would have accepted the offer, pertinent factors to be considered include: whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea bargain and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he or she was amenable to negotiating a plea bargain. In this context, a defendant's self-serving statement – after trial, conviction, and sentence – that with competent advice he

or she would have accepted a proffered plea bargain is insufficient in and of itself to sustain the defendant's burden of proof as to prejudice, and must be corroborated independently by objective evidence. A contrary holding would lead to an unchecked flow of easily fabricated claims" (*In re Alvernaz, supra,* 2 Cal.4th at p. 939.) [Petitioner] acknowledges that he had information from his mother before trial began that the terms of the plea offer differed from what counsel allegedly told him. His assertions that he was unable to raise the issue with his attorney before trial are simply not credible. Even if he could not reach his attorney on the telephone, he appeared in court with counsel before and during the trial. And even if counsel had refused to discuss the matter, [petitioner] has made no showing that he could not have raised the question with the trial court, asked for a clarification of the terms, and accepted the offer. In addition, [petitioner] was facing his fourth trial in this matter. The first two ended in hung juries; the third resulted in a reversal. A person in [petitioner's] situation would most likely believe that, at trial, he would have a very good chance of a voluntary manslaughter conviction. That he faced a mid-term of six years in prison, with credit for the approximately five years he had already been in prison if he were convicted of voluntary manslaughter following trial, as compared to 11 years in prison, including a waiver of all pre-sentence credits under the plea offer, further shows the likelihood a person in [petitioner's] shoes might well choose to go to trial rather than accept the plea offer.

Thus, [petitioner's] opportunity to request a clarification of the terms of the plea offer prior to sentencing, along with the likely benefits of proceeding to trial, convince us that [petitioner] "has [not] established a reasonable probability that, with effective representation, he . . . would have accepted the proffered plea bargain." (*In re Alvernaz, supra,* 2 Cal.4th ap. 938.) Consequently, because he has not shown that he would have accepted the plea bargain, the prejudice requirement described in *Alvernaz* has not been met. (See *In re Alvernaz, supra,* 2 Cal.4th at pp. 936-

937; *People v. Snyder, supra.* 14 Cal.App.4th at p. 1176.)

> Even assuming his factual allegations to be true, [petitioner] has not demonstrated that he received constitutionally inadequate representation in the plea bargaining process, and accordingly, has not made a prima facie showing on this issue.

(People v. Nunes, Nos. A063524 and A068851, slip op. at 28-31.)

The issue of this ineffective assistance of counsel claim is whether there was a reasonable likelihood that petitioner would have taken the plea offer had his trial counsel correctly communicated the plea offer. The state Court of Appeal correctly set forth the factors that the court should take into account to determine whether a defendant, with effective assistance, would have accepted the offer: "whether counsel actually and accurately communicated the offer to the defendant; the advice, if any, given by counsel; the disparity between the terms of the proposed plea offer and the probable consequences of proceeding to trial, as viewed at the time of the offer; and whether the defendant indicated he . . . was amenable to negotiating a plea bargain." (People v. Nunes, Nos. A063524 and A068851, slip op. at 30.) The appellate court confirmed that petitioner's post-sentence, self-serving statement that with competent advice he would have accepted a proffered plea offer, standing alone, would be insufficient to meet his burden of proof as to prejudice. Thus, the appellate court correctly stated that objective evidence must independently corroborate such a statement. (Alvernaz, supra, 2 Cal.4th at 939.)

However, the Court of Appeal failed to adequately examine most of the above factors, and thus deprived petitioner of the ability to provide such objective evidence. The appellate court stated that it did not need to resolve whether trial counsel correctly communicated the terms of the plea agreement because regardless of any deficient performance on counsel's part, petitioner had not shown prejudice. But the first factor in determining prejudice required the court to ascertain whether

counsel actually and accurately communicated the offer to petitioner. Rather than hold an evidentiary hearing to determine exactly what terms trial counsel relayed to petitioner, the appellate court chose to reiterate conflicting statements trial counsel made to appellate counsel and respondent's counsel:

> Appellate counsel Richard L. Rubin declares that trial counsel told him the offer he communicated to [petitioner] included an 11-year sentence for voluntary manslaughter and, he believed, a 3-year consecutive sentence for firearm use, with a waiver of all presentence credits. [Footnote omitted.] Deputy Attorney General Violet M. Lee declares that trial counsel informed her that he had fully communicated the prosecutor's offer of an 11-year sentence with a waiver of presentence credits.

(People v. Nunes, Nos. A063524 and A068851, slip op. at 29.) The appellate court chose to either ignore or find incredible the conflicting testimony of petitioner, who protested that his understanding of the plea offer was for a 22-year sentence.

More important, however, were the appellate court's failure to ascertain what advice, if any, was given by trial counsel to petitioner concerning the plea offer, and its failure to inquire into the disparity between the terms of the proposed plea offer and the probable consequences of proceeding to trial, as viewed at the time of the offer. Other than the conflicting declarations of Ms. Lee and Mr. Rubin, there was no evidence provided to show that petitioner was informed how the plea offer would ultimately affect the number of years he would be required to serve under all charges, both pending and those already incurred from his first trial. In addition, no evidence was provided to show whether petitioner had been informed of the risk he would face with regard to likelihood of parole under a second degree murder verdict.

Rather than focus on the communication between petitioner's trial counsel and petitioner, the appellate court focused on the fact that petitioner had been told by his mother before trial began that the terms of the plea offer differed from what counsel

allegedly told him. There was no evidence before the appellate court as to how long the plea offer remained open, and it is unclear whether the appellate court considered the possibility that the plea offer expired once petitioner's trial counsel rejected it, thus rendering any later speculation about the offer and/or petitioner's duty to revisit the terms of the offer with counsel or the court to be moot.

It was error for the court to find, without sufficient evidence before it, that petitioner was not prejudiced because he could have subsequently raised the terms of the offer either with counsel or the trial court. The appellate court made no effort to determine any details concerning petitioner's relationship with counsel to ascertain whether there was some merit to petitioner's testimony. The court had before it reporter's transcripts reflecting trial counsel's repeated non-appearances (July 9, 12 and 16, 1993) and a complete failure to appear by any counsel on petitioner's behalf on July 16, 1993. (Petitioner's Exs. 6 - 9.)

Even though petitioner's appellate counsel submitted documents attesting to petitioner's trial counsel's hands-off approach to representing criminal defendants (see Exs. A-F to Petitioner's September 11, 1996 Motion, attached as Ex. H. to respondent's Answer), the Court of Appeal found these materials of "dubious relevance" because that court found petitioner was not prejudiced by any failure of counsel to communicate. (People v. Nunes, Nos. A063524 and A068851, slip op. at 29.) However, this court finds such evidence directly relevant to the factors the appellate court was to consider in order to determine whether petitioner had been prejudiced.

Finally, it appears the appellate court placed emphasis on the status of petitioner's criminal charges at the time. The court recounted that petitioner's first two trials ended in hung juries, the third trial was reversed on appeal, and he now faced a fourth trial. The appellate court interpreted that history as offering petitioner a very good chance of a voluntary manslaughter conviction, with a mid-term of six years in prison, with credit for the approximately five years he had already been in prison

if he were convicted of voluntary manslaughter following trial. Thus, the appellate court found that the plea offer of an 11 year sentence with no presentence credits would not have been appealing to petitioner, negating his statement he would have taken such a plea offer.

However, the first two trials were mistrials because the jury could not reach a unanimous verdict of second degree murder. Petitioner's trial counsel testified that his recollection was that it was always hung in favor of the life sentence. (EHT 101.) The third trial, where petitioner was convicted of second degree murder and use of a firearm, was reversed because the trial judge spoke with the jury outside the presence of the defendant and his trial attorney. The reversal of the third trial's verdict was due to a procedural error and should not have bolstered the petitioner's confidence in obtaining a manslaughter verdict from the fourth jury.

In addition, the fact that petitioner was facing a fourth trial speaks to the confidence the prosecution had that he could win another second degree murder verdict. The prosecution was unwilling to forego a fourth trial having sustained assault and firearm counts against petitioner from the first jury's verdict. Also, the prosecution now had three different trial transcripts from which to draw impeachment testimony to use against petitioner in the fourth trial. Given the evidence the prosecution had against petitioner and the second degree murder verdict sustained after the third trial, this court finds that the criminal charges pending against petitioner on the eve of his fourth trial were not reasonably stacked in favor of a manslaughter verdict. It was not reasonable to conclude that petitioner would not have taken the plea offer on that basis.

Accordingly, this court finds the state court decision was erroneous. Van Tran, 212 F.3d at 1155. That finding does not, however, end this court's inquiry. The error only entitles petitioner to federal habeas corpus relief if the state court's decision was "contrary to, or involved an unreasonable application of, clearly established Federal law." See Van Tran, at 1155.

> In a long line of cases that includes Powell v. Alabama, 287 U.S. 45 . . . (1932), Johnson v. Zerbst, 304 U.S. 458 . . . (1938), and Gideon v. Wainwright, 372 U.S. 335 . . . (1963), this Court has recognized that the Sixth Amendment right to counsel exists, and is needed, in order to protect the fundamental right to a fair trial. The Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment, including the Counsel Clause:
>
> > "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, . . . and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."
>
> Thus, a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal for resolution of issues defined in advance of the proceeding. The right to counsel plays a crucial role in the adversarial system embodied in the Sixth Amendment, since access to counsel's skill and knowledge is necessary to accord defendants the "ample opportunity to meet the case of the prosecution" to which they are entitled. Adams v. United States ex rel. McCann, 317 U.S. 269, 275, 276 . . . (1942); see Powell v. Alabama, supra, 287 U.S. at 68-69. . . .

Strickland, 466 U.S. at 684-685. Simple failure to render adequate legal assistance can also constitute ineffective assistance of counsel. Cuyler v. Sullivan, 446 U.S. 335 at 344, 345-50 (1980) (ineffective assistance of counsel occurred by attorney's actual conflict of interest adversely affecting attorney's performance).

The plea bargaining stage of a criminal proceeding is a critical stage in the criminal process at which a defendant is

entitled to the effective assistance of counsel guaranteed by the Sixth Amendment to the United States Constitution. See Hill v. Lockhart, 474 U.S. 52 (1985); McMann v. Richardson, 397 U.S. 759 (1969). Counsel's duties to ensure defendants get a fair trial include "the overarching duty to advocate the defendant's cause and the more particular duties to consult with the defendant on important decisions and to keep the defendant informed of important developments in the course of the prosecution." Strickland, 466 U.S. at 688. A defendant has a constitutional right to participate in the making of certain decisions fundamental to his defense. Jones v. Barnes, 463 U.S. 745, 751 (1983). The decision to plead guilty is one such fundamental decision. Boyken v. Alabama, 395 U.S. 238, 242-44 (1969); Brookhart v. Janis, 384 U.S. 1, 7 (1966).

The Supreme Court has held that where a defendant pleads guilty as a result of ineffective assistance of counsel, defendant has suffered a constitutional violation that gives rise to a claim for relief from the guilty plea, applying the two prongs of Strickland, supra. Hill, 474 U.S. at 56-60; McMann, 397 U.S. at 771. The Supreme Court has not expressly held the converse to be true, that is, where a defendant rejects a plea offer and opts to proceed to trial based on counsel's ineffective representation, defendant has suffered a violation of his constitutional right to the effective representation of counsel. But a persuasive number of lower courts have "recognized that the right to effective assistance of counsel extends to the decision to reject a plea offer, even if the defendant subsequently received a fair trial." Arizona v. Donald, 198 Ariz. 406 (2000) (review denied March 20, 2001) (citing, inter alia, Turner v. Tennessee, 858 F.2d 1201 (6th Cir.1988) (incompetent advice to reject a plea offer may constitute a Sixth Amendment deprivation), vacated on other grounds sub nom. Tennessee v. Turner, 492 U.S. 901 (1989); In re Alvernaz, 2 Cal.4th 924, 8 Cal.Rptr.2d 713 (1992) (incompetent counseling as to the consequences of rejecting a plea offer may constitute a Sixth Amendment deprivation if defendant suffered prejudice). Therefore, the Strickland ineffective assistance of counsel test applies to habeas challenges to defense counsel's advice concerning a guilty plea offer. See Hill v. Lockhart, 474 U.S. 52, 58 (1985); Iaea v.

Sunn, 800 F.2d 861 864 (9th Cir.1986). Moreover, defendants have a constitutional right to participate in decision-making fundamental to their defense, Jones v. Barnes, 463 U.S. 745, 751 (1983), and the decision to plead guilty is such a fundamental decision. Boykin v. Alabama, 395 U.S. 238, 2342-44 (1969); Brookhart v. Janis, 384 U.S. 1, 7 (1966).

A plea decision is involuntary if it results from an incomplete understanding of the circumstances. Cf. Henderson v. Morgan, 426 U.S. 637, 645 n.13 (1976) (plea is involuntary if defendant does not understand charge or what he is waiving); Smith v. O'Grady, 312 U.S. 329, 334 (1941) (must understand change).

This court finds that the state court's approach to the prejudice analysis in this case led to a decision that was contrary to the prejudice test enunciated in Strickland, supra. Therefore, the appellate court's holding on this claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States. 28 U.S.C. § 2254(d)(1).

As noted above, this court held an evidentiary hearing to ascertain whether petitioner had met both prongs of Strickland, supra. Trial counsel's understanding of the plea offer differed from the plea offer the prosecution had proposed. (Compare EHT 147, 161, 169 to EHT 63, 64-65, 85-87, 90-92.) Thus, petitioner's trial counsel did not accurately communicate the prosecution's plea offer to petitioner. And, in the five minutes trial counsel spent communicating the offer to petitioner, trial counsel did not adequately explain the offer to petitioner. (EHT 67, 128, 133, 136, 195; Evidentiary Hearing Transcript, Day II (hereafter "EHT-II") at 2.) Petitioner testified that he would have taken the plea offer had it been accurately communicated and adequately explained to him. (EHT 196; EHT-II at 34.) Mrs. Nunes also testified that petitioner had expressed a willingness to accept a plea offer. (EHT 36.) Because the court of Appeal focused on the prejudice prong, this court will begin its analysis with the Strickland prejudice prong.

Prejudice

A. Whether Petitioner Demonstrated Prejudice

As noted above, petitioner must demonstrate that there is a reasonable probability that, but for counsel's unprofessional errors, petitioner would have accepted the plea offer. Strickland, 466 U.S. at 693-94; Hill v. Lockhart, 474 U.S. 52, 58-59 (1985). A reasonable probability is "a probability sufficient to undermine confidence in the outcome." Id. at 694.

Petitioner argues that several significant facts support his assertion that he would have accepted the plea offer had it been correctly explained to him:

1. Petitioner's defense was always that he was guilty of voluntary manslaughter, never that he was innocent. (EHT 72; 189.) Petitioner argues it was inevitable he would be found guilty of something, and there was a strong possibility he would have received a thirteen year sentence even if he "won" at trial. (EHT 72.) At a minimum, petitioner argues, the proposed disposition would have spared petitioner a mandatory firearms enhancement.

2. Petitioner was convicted of second degree murder and sentenced to 17 years to life after his third trial. Petitioner argues his conviction was reversed on a procedural error caused in part by his trial counsel's absence from the proceedings. (EHT 101.)

3. The difference between going to trial and winning a voluntary manslaughter conviction with a gun enhancement versus taking the plea offer was only three years in custody. (EHT 73, 167-68.) Petitioner argues that the difference between going to trial and losing versus taking the plea offer was life in prison versus 5-1/2 more years in custody.

4. Petitioner expressed a willingness to plead guilty several times before the plea offer. (EHT 8, 43, 185.) Petitioner wrote superior court judges stating he would be willing to accept a plea to voluntary manslaughter. (EHT-II at 37-38; Petitioner's Exs. 28, 29.)

5. Petitioner's misunderstanding about trial counsel's offer was significant in that he believed the offer required an additional 22 years in prison with no credit for time in custody on any charges. (Petitioner's Ex. 3.) Petitioner believed the offer required him to serve time on the assault charges when he had already served that time.

6. Petitioner asked his mother to call the district attorney to clarify the offer. (EHT 40-41.) Petitioner argues that if he believed he had rejected the plea offer, he would not have done this. Petitioner's mother did not contact the prosecutor because petitioner's appellate counsel told her not to. (EHT 40-41.)

7. Petitioner's trial counsel's discussion of the plea offer with petitioner lasted only five minutes. Petitioner contends that it is not possible for a competent attorney to adequately and accurately explain the plea offer to him, particularly under the circumstances of this case with its complicated procedural history. Petitioner argues that trial counsel had to explain how the prior assault sentences, the waiver of presentence credits, and the parole possibilities were affected by the plea offer, and what rejecting the plea offer would mean. Petitioner argues that trial counsel would have to explain, if asked, why counsel could not try to negotiate further for a lower sentence. Petitioner argues that this would take additional time because trial counsel was dealing with a client facing murder charges who had had no communication with his attorney in months.

8. Petitioner had not been charged with a felony prior to this case. (EHT 195.) Petitioner was a model prisoner who would reasonably expect to earn credits reducing in half his sentence of 11 years. (EHT 71.) Thus, petitioner argues, he would realistically expect to parole from a voluntary manslaughter conviction after five and a half years in custody. Petitioner knew from experience he could not expect to be paroled from a murder conviction in California by 1993. (See Petitioner's Ex. 3.)

Respondent contends that this case boils down to petitioner's credibility versus trial counsel's credibility, and that petitioner's

testimony is incredible. Respondent further contends that trial counsel correctly communicated the plea offer to petitioner, thus negating petitioner's ineffective assistance of counsel claim. Respondent argues that even were the court to find petitioner's trial counsel ineffective, petitioner cannot prove the prejudice prong of Strickland because petitioner was alerted to the discrepancy in the plea offer shortly after July 22, 1993, yet failed to obtain clarification from his trial counsel or the court.

Petitioner counters that requiring petitioner to pursue the plea offer on his own, when he was represented by counsel, would eviscerate the Sixth Amendment. Petitioner argues that regardless of credibility findings or memory discrepancies among all the witnesses, the collaborative testimony of petitioner's trial counsel, Mr. Kinnicutt, Ms. Nunes and petitioner undermines confidence that petitioner would have proceeded to trial had Mr. Kinnicutt's plea offer been accurately communicated and explained to petitioner. Moreover, petitioner contends that trial counsel's memory of specific events in 1993 is questionable due to counsel's testimony concerning his illness, lack of sleep, and heavy drinking.

Prejudice Analysis

In order to determine whether petitioner would have taken the plea offer, the court must compare the prosecution's understanding of the plea offer with that of trial counsel to discern whether trial counsel accurately communicated the offer to petitioner. At the evidentiary hearing, Mr. Kinnicutt's description of the plea offer was that petitioner was to plead guilty to voluntary manslaughter, waive all presentence credits on the voluntary manslaughter charge, and serve a sentence of 11 years. (EHT 147, 161, 169.) By omission, Mr. Kinnicutt was dismissing the consecutive gun enhancement, and he was not requiring additional time on the assault charges petitioner had already served. (EHT 161-69.) Mr. Kinnicutt calculated petitioner would serve an additional five and a half years under this plea offer. (EHT 170.)

Petitioner's trial counsel, however, testified that the plea offer

included a firearm enhancement, that it required petitioner to waive credits earned on the assault charges, and that petitioner could still be required to serve additional time under the assault charges. EHT 85-86; 90-1. (A firearm enhancement under California law would be consecutive to the manslaughter charge. Cal. Penal Code § 12022.5.) These differences in understanding of the actual plea offer demonstrate theat petitioner's trial counsel could not have accurately communicated the plea offer proposed by Mr. Kinnicutt.

Petitioner and his trial counsel have different recollections of what was said during the five minutes trial counsel presented the offer to petitioner. However, they agree that trial counsel told petitioner the plea offer included a firearm enhancement, that he would get no credit for any time served prior to the plea offer, and that petitioner could still be sentenced and serve additional time on the assault charges. (EHT 91-92; 126.) Petitioner and trial counsel both testified that trial counsel did not explain the plea offer to petitioner. (EHT 73, 128, 133, 136.) These similarities in testimony alone demonstrate that petitioner's trial counsel did not accurately inform or explain the Mr. Kinnicutt's plea offer to petitioner.

Although petitioner thought the plea offer was still open because he had asked his trial counsel to get further information from the prosecution about the offer, it appears petitioner's trial counsel thought the plea offer had expired because he did not raise it again with petitioner. In fact, he told Mr. Kinnicutt that petitioner had rejected the plea offer, even though petitioner argues that he did not reject it, and both Mr. Kinnicutt and petitioner's trial counsel agree that the offer had expired at least on or near jury selection. The expiration of the plea offer is one reasonable explanation why petitioner's trial counsel would not or did not discuss the plea offer any further with petitioner.

Petitioner's alleged understanding of the plea offer as communicated to him by his trial counsel is difficult to explain. But given the complex procedural history of this case, petitioner's trial counsel's admitted lack of communication with petitioner, as well as trial counsel's personal misunderstanding

of the plea offer, petitioner's confusion as to the actual terms of the plea offer does not appear to be unreasonable. The fact that petitioner felt trial counsel had lied to him when he found out about a discrepancy between the offer from Mr. Kinnicutt and the offer presented by petitioner's trial counsel speaks to petitioner's dissatisfaction with his trial counsel. (For example, see Petitioner's Exs. 28-30.)

Respondent and the Court of Appeal make much of petitioner's failure to voice his concerns to someone once he learned of discrepancies in the plea offer. But it would be illogical to penalize petitioner for not successfully clarifying this plea offer with his trial counsel when trial counsel himself was under a misapprehension as to the complete terms of the plea offer. Given petitioner's trial counsel's general practice of only communicating with his clients when he thought it was absolutely necessary, it is easy to envision trial counsel refusing to speak to petitioner about a plea offer that counsel believed had expired.

Although petitioner perhaps could have raised his concerns with the trial court, an attempt to speak directly to the trial judge could have been both improper and prejudicial. Petitioner was represented by counsel and, under the Sixth Amendment, was entitled to the assistance of that counsel. Strickland, 466 U.S. at 684. It was counsel's duty to accurately communicate the plea offer and to adequately explain the plea offer to petitioner. The American Bar Association recognizes this duty by requiring defense attorneys to "promptly communicate and explain to the accused all significant plea proposals made by the prosecutor." ABA Standards for Criminal Justice, Prosecution Function and Defense Function, Standard 4-6.2(b) (3d ed. 1993). The explanation of that plea offer must permit petitioner to make a reasonably informed decision whether to accept or reject the plea offer. See Hill v. Lockhart, 474 U.S. at 56-57 (whether the guilty plea was voluntary depends on the adequacy of counsel's advice). The fact that the plea offer would have resulted in only three more years of prison time longer than if petitioner had actually won at trial would have been critical information trial counsel should have imparted to petitioner.

Even though petitioner's trial counsel testified that he urged petitioner to accept the plea offer two or three times, it is incredible that the requisite amount of legal advice and persuasion occurred within that five minute period of time.

If trial counsel were so loathe to try this case a fourth time, he would have been well-advised to spend some time attempting to persuade petitioner to make the reasonable choice. There was ample opportunity to continue negotiations because the trial was continued for a number of days due to trial counsel's not being prepared. Petitioner's trial counsel had a duty to consult with petitioner on such a critical decision, Strickland, 466 U.S. at 688, and share his legal knowledge so that petitioner could make an informed choice between accepting the plea offer or proceeding to trial. Id. The gross disparity between the risk petitioner faced going to trial, compared to accepting this plea offer, made it critical for petitioner's trial counsel to compare the terms of each in detail with petitioner so that his choice would be a voluntary and informed one. Petitioner's trial counsel testified that he did not do that and there was no way petitioner could have figured out that information on his own. (EHT 73.)

It appears more likely that petitioner's trial counsel did not have a clear understanding of the plea offer presented by Mr. Kinnicutt and, because of counsel's state of unreadiness to try the case that day, may not have been in a position to accurately compare the plea offer to the risks of trial. Given the serious disparity between those two options, petitioner was in dire need of competent legal assistance to assist him in reaching the better decision. Petitioner's trial counsel deprived petitioner of that assistance.

But for petitioner's trial counsel's failure to accurately communicate and adequately explain the plea offer to petitioner, petitioner would have taken the plea offer. This is supported by the fact that petitioner and his trial counsel both testified that their defense was always voluntary manslaughter; neither had maintained petitioner was innocent. (EHT 189.) In addition, petitioner expressed his eagerness to receive a plea offer and

willingness to accept such a plea offer prior to July 22, 1993. (EHT 43, 184-85.) On April 10, 1993, petitioner wrote a letter to Judge Harrison in which he asked the court to drop the murder charge for a plea to the lesser charge of manslaughter. (Petitioner's Ex. 28.) On June 19, 1993, petitioners wrote a letter to Judge Smith, before whom he appeared in May, in which he stated "I've always agreed to plead to a manslaughter charge because that's what I believe it was." (Petitioner's Ex. 29.)

The court finds that counsel's deficient performance resulted in petitioner not availing himself of a fair plea offer, thus rendering the plea negotiation process fundamentally unfair. Cf. Lockhart, 506 U.S. at 372. This court finds that petitioner would not have proceeded to trial had Mr. Kinnicutt's plea offer been accurately communicated and adequately explained to petitioner. Accordingly, petitioner has met the prejudice prong of Strickland. Id., 466 U.S. at 668. The court must now determine whether petitioner has demonstrated that his trial counsel's performance fell outside the wide range of professional competent assistance. Id. at 690.

Trial Counsel's Performance

B. Whether Petitioner Proved Trial Counsel's Performance Was Unreasonable

Petitioner argues that trial counsel was objectively unreasonable first as a general practice and second in his representation of petitioner. Petitioner contends that trial counsel:

> generally did not meet with his clients (RT 47); his bedside manner was 'gruff' (RT 47); a 120 second telephone conversation as an extensive telephone conversation with a client (RT 49); he did not explain to clients how much time they would serve under proffered plea offers (RT 66-67); he did not consult with his clients on any issues except whether or not they wanted to testify (RT 78).

(Petitioner's Post Evidentiary hearing Brief at 6.) Petitioner contends that Standard 4-3.8 of the ABA Standards for Criminal Justice (2d ed. 1980) requires defense counsel to keep clients informed of case developments and promptly comply with reasonable requests for information. Petitioner argues that petitioner's trial counsel admitted he generally does not comply with this requirement. (Petitioner's Post Evidentiary Hearing Brief at 6.)

Petitioner contends he was a victim of this unreasonable behavior: Trial counsel did not talk to petitioner (RT 61-62, 179, 192-93, Petitioner's Ex. 4); trial counsel sent other lawyers to attend hearings where petitioner was required to relinquish rights without prior consultation with his counsel (RT 181, 183, Petitioner's Exs. 6-9); and trial counsel allowed petitioner to participate in a hearing without benefit of counsel (RT 183, Petitioner's Ex. 9.) Petitioner further argues that trial counsel lied to petitioner and his mother a number of times about counsel visiting petitioner (RT 6, 51), and that petitioner was so unprepared for trial that he asked to be relieved as petitioner's trial counsel (RT 54, Petitioner's Ex. 6 at ¶ 8.) Petitioner contends he complained about this unreasonable behavior to the jail and to superior court judges, to no avail. (Petitioner's Exs. 4, 28-30.)

Petitioner argues that his trial counsel was objectively unreasonable by failing to explain and accurately communicate the plea offer to petitioner (RT 133, 136, 85-86, 92-93, 137, 186-190, Petitioner's ex. 21, ¶2). Petitioner contends this failure falls below the objective standard of reasonableness under prevailing professional norms. See Iaea v. Sunn 800 F.2d 861, 865 (9th Cir.1986) (counsel have duty to supply criminal defendants with necessary and accurate information); In re Alvernaz, 2 Cal4th 924, 937 (1992)(same). (Petitioner's Post Evidentiary Hearing Brief at 7-8.)

Petitioner further argues that petitioners's assistance was objectively unreasonable with respect to the rejection of the plea offer. (Petitioner's Post Evidentiary Hearing Brief at 8.) Petitioner's trial counsel testified that he urged petitioner to

accept any plea offer to a determinate term, meaning that trial counsel had a disagreement with petitioner over whether to plead guilty. (Id. at 8-9.) Petitioner contends trial counsel violated ABA Standard 4-5.2(c) by failing to make a complete record of this disagreement over the most important issue in his representation. (Petitioner's Post Evidentiary hearing Brief at 9.)

Petitioner argues that trial counsel acknowledged his awareness of a recent California Supreme Court case requiring defense lawyers to communicate plea offers to their clients. (RT 94.) Petitioner suggest this case was In re Alvernaz, 2 Cal.4th 924 (1992). Petitioner argues that trial counsel testified that this case prompted him to place any rejection on the record and ask the court to inquire of his client in every case in which this happened. (RT 94, 95-96.) Yet, petitioner notes, there is no mention in petitioner's trial record of: "(1) the fact of a plea offer; (2) the precise terms of the plea offer; (3) the punishment that Mr. Nunes would face with the plea offer; or (4) Mr. Nunes's response to the plea offer." (Petitioner's Post Evidentiary Hearing at 9.) Thus, petitioner argues, petitioner's trial counsel failed to provide effective assistance of counsel as described by the California Supreme Court. (Petitioner's Post Evidentiary Hearing Brief at 9-10, citing In re Alvernaz, 2 Cal.4th at 938 n.7.)

Respondent contends that petitioner's trial counsel "correctly communicated to petitioner Mr. Kinnicutt's offer of 11 years for voluntary manslaughter with waiver of all presentence custody credits" based on Violet M. Lee's declaration concerning her telephone conversation with petitioner's trial counsel. (Respondent's Post evidentiary Hearing Brief at 19.)

Analysis of Trial Counsel's Performance

Under this prong of Strickland, petitioner must show that, in light of all circumstances, counsel's performance fell below an objective standard of reasonableness. Strickland, 466 U.S. at 690. As noted above, "[r]eview of counsel's performance is highly deferential and there is a strong presumption that

counsel's conduct fell within the wide range of reasonable representation." United States v. Ferreira-Alameda, 815 F.2d 1251 (9th Cir.1986.)

Petitioner's arguments concerning trial counsel's ineffective performance are well taken. Respondent has offered no substantive arguments to the contrary, other than to contend trial counsel correctly communicated the plea offer to petitioner. A review of the record reflects that trial counsel took a novel approach to representing clients, opting to have his investigator meet with his clients, and choosing a narrow range of matters he deemed important enough to discuss with his clients. Based on trial counsel's general practice alone, this court cannot find that petitioner's trial counsel's performance fell within the wide range of reasonable representation, because his general practice falls below the "[p]revailing norms of practice as reflected in American Bar Association standards." Strickland, 466 U.S. at 688.

But trial counsel's performance concerning Mr. Kinnicutt's plea offer fell even further below the reasonable standard. As noted above, trial counsel failed to accurately communicate the plea offer to petitioner. Trial counsel then failed to explain the plea offer. There was no dispute that the exchange between petitioner and his trial counsel concerning the plea offer only lasted about five minutes. (EHT 12, 185, 198, 66.)

A reasonable trial lawyer, faced with the known risk of a second degree murder conviction, would have spent more time with petitioner, evaluating petitioner's position after the third trial where he was convicted of second degree murder, petitioner's position had he accepted Mr. Kinnicutt's offer, even as misperceived by trial counsel, and petitioner's position under the alternative options facing him at the end of a fourth trial. A reasonable trial lawyer would have calculated the projected release and parole periods under each of those positions, and ascertained the true difference between petitioner winning at trial versus taking the plea offer. Rather than just restating the offer (although it is important to remember that counsel did not get the offer right) and telling petitioner to take it, trial counsel

could have used this information to educate and assist petitioner in making an informed and voluntary decision. Petitioner's trial counsel failed to explain the offer and the consequences of rejecting the offer such that he deprived petitioner of effective assistance of counsel, thus violating petitioner's Sixth Amendment rights.

Moreover, had counsel's evaluations failed to convince petitioner, a reasonable trial lawyer, particularly a criminal defense lawyer, would have placed this failure on the record to protect both himself and his client. See In re Alvernaz, 2 Cal.4th at 924. This would have given petitioner's trial counsel another opportunity to describe the plea offer, and the judge could have inquired of petitioner whether petitioner understood the plea offer.

Accordingly, this court finds that petitioner has demonstrated trial counsel was ineffective, in light of all the circumstances, trial counsel's identified acts and omissions fell outside the wide range of professional competent assistance. Strickland, 466 U.S. at 690.

In light of the above findings that petitioner has demonstrated both prongs of the Strickland test, petitioner's claim of ineffective assistance of counsel with regard to the plea offer should be granted. This court is required to fashion a remedy that is "tailored to the injury suffered and [does] not unnecessarily infringe on competing interests." United States v. Blaylock, 20 F.3d 1458 (1994), quoting United States v. Morrison, 449 U.S. 361, 364 (1981).

Petitioner should be returned to the position he would have been in had his Sixth Amendment rights not been violated. Blaylock, 20 F.3d at 1468. "Requiring the government to reinstate its original plea offer is constitutionally permissible." Id., see Mabry v. Johnson, 467 U.S. 504, 510 n.11 (1984). Santobell v. New York, 404 U.S. 257, 263 (1971); see also United States v. Partido-Parra, 859 F.2d 629, 633 (9th Cir.1988) (noting that in certain circumstances "it may be appropriate for the court to order 'specific performance' of the [plea] bargain").

This comports with the Supreme Court's policy that the "Sixth Amendment mandates that the State bear the risk of constitutionally deficient assistance of counsel." Kimmelman v. Morrison, 477 U.S. 365 (1986).

Given the passage of time, petitioner has served over fourteen years, more than three years longer than he would have served under Mr. Kinnicutt's plea offer, without receiving credit for post-sentence time served on the assault charges. Accordingly, this court will recommend that the state be directed to vacate the second degree murder judgment and reinstate the original voluntary manslaughter plea offer to petitioner.

III. Ineffective Assistance of Appellate Counsel

The parties agree that the ineffective assistance of appellate counsel claim is now moot (see Petitioner's Report Re: Proposed evidentiary Hearing, filed May 11, 2000, at 2).

IV. Uncontroverted Evidence

Petitioner's fourth claim is that the evidence presented at trial was uncontroverted because petitioner was emotionally distraught, heavily intoxicated, and, within minutes of the shooting, had just discovered his wife naked under her robe (not her usual sleeping attire) and then encountered the victim in what had previously been petitioner's marital bed. (Second Amended Petition at 6.) Petitioner contends that he shot the victim "as the consequence of sudden quarrel or heat of passion based on adequate provocation" (id.) which "amounts to voluntary manslaughter, not murder." (Id.)

Respondent counters that there was sufficient evidence for the jury to find beyond a reasonable doubt that petitioner committed second degree murder because he intentionally killed the victim and was not acting under heat of passion. (Mem. P's and A's at 47.)

In his traverse, petitioner concedes that there was sufficient evidence to support the first three elements of second degree

murder, but argues that there was insufficient evidence of malice. (Traverse at 10.) Petitioner contends that the Court of Appeal erred by ignoring the alternative justification of "sudden quarrel."

When a challenge is brought alleging insufficient evidence, federal habeas corpus relief is available only if it is found that upon the record evidence adduced at trial, viewed in the light most favorable to the prosecution, no rational trier of fact could have found proof of guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324 (1979). Under Jackson, this standard must be applied with reference to the substantive elements of the criminal offense as defined by state law. Id. at 324 n.16. Moreover, the court must review the entire record when the sufficiency of the evidence is challenged on habeas. Adamson v. Ricketts, 758 F.2d 441, 448 n.11 (9th Cir.1985), vacated on other grounds, 789 F.2d 722 (9th Cir.1986)(en banc) re'vd, 483 U.S. 1 (1987).

> The reviewing court must respect the province of the jury to determine the credibility of witnesses, resolve evidentiary conflicts, and draw reasonable inferences from proven facts by assuming that the jury resolved all conflicts in a manner that supports the verdict. United States v. Endicott, 803 F.2d 506, 515 (9th Cir.1986), cert. denied, 510 U.S. 971, 114 S.Ct. 456, 126 L.Ed.2d 388 (1993). "Circumstantial evidence and inference drawn from it may be sufficient to sustain a conviction." United States v. Lewis, 787 F.2d 1318, 1323 (9th Cir.), amended on denial of reh'g, 798 F.2d 1250 (9th Cir.1987, cert. denied, 489 U.S. 1032, 109 S.Ct. 1169, 103 L.Ed.2d 227 (1989). Nevertheless, "mere suspicion or speculation cannot be the basis for creation of logical inferences." Id.

Walters v. Maass, 45 F.3d 1355, 1358 (9th cir. 1995).

Under California law, second degree murder is defined as the unlawful killing of a human being when: "the killing resulted from an intentional act, the natural consequences of the act are dangerous to human life, and the act was deliberately performed with knowledge of the danger to, and with conscious disregard

for, human life." CALJIC 8.31. The killing must be done with malice aforethought. CALJIC 8.30. Express malice is defined as manifesting an intent to unlawfully kill a human being. CALJIC 8.11. Malice is implied when: 1) the killing resulted from an intentional act; 2) the natural consequences of the act are dangerous to human life; and 3) the act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. Id.

The California Court of Appeal resolved this claim as follows:

> First, the evidence showed that [petitioner's] unreasonably jealous conduct had escalated during their separation. On the early morning in question, he saw Prien's car at a bar and let the air out of the tires. He later telephoned her and called her a "slut" and a "whore." Less than an hour before going to her apartment that morning, he called his mother and told her he suspected Prien was "screwing around" with another man. He then went to Prien 's apartment with a loaded gun and proceeded to threaten the occupants of the apartment with the gun and, after Fure and Garant fled, asked Prien if someone else was there before pushing past her and going to the bedroom where he shot Gonsalves three times. Thus, there was evidence that he suspected Prien was with another man the morning of the shooting and that he went to her apartment with a gun to confront them and perhaps exact revenge. (See *People v. Hyde* (1985) 166 Cal.App.3d 463, 473 ["It is important. . . to distinguish between jealousy as a motive for the killing and jealousy sufficient to invoke the 'heat of passion' concept."].)
>
> In addition, while [petitioner] testified that Gonsalves was "coming at" him when he shot him and was still coming at him when he fled the room, medical evidence showed that Gonsalves was sitting or lying down for at least one of the shots. [Petitioner] also testified that he went to Prien 's apartment to threaten suicide. The jury was not unreasonable in rejecting this testimony, given that no

witness saw [petitioner] put the gun to his head or heard him mention suicide. Although there was evidence that [petitioner] was distraught and under the influence of alcohol when he shot Gonsalves, the witnesses agreed that he did not seem out of control or unaware of his actions.

Furthermore, even had [petitioner] met the subjective element of heat of passion, he clearly has not satisfied the objective element, which requires a showing of adequate provocation. [Petitioner], by his own admission, was extremely jealous and possessive of Prien. Even after their separation, he attempted to control her, trying to keep her from going out, and keeping tabs on her activities. He also was admittedly extremely depressed and a heavy drinker. His behavior on the morning of the shooting shows that he was harassing Prien, from whom he had been separated for five or more weeks and whom he suspected wanted a divorce. There is no evidence that Prien was attempting to provoke or humiliate him; she was merely living her life.

We thus cannot say the jury was irrational in finding that [petitioner's] indignation and fury over Prien's social life was not "such a passion as naturally would be aroused in the mind of an ordinarily reasonable person in the same circumstances." (CALJIC No. 8.42, *People v. Wickersham, supra,* 32 Cal.3d at p. 3261; see also *In re Thomas C., supra,* 183 Cal.App.3d at p 798 [defendant's clinical depression was "not the ordinary man's average disposition."].) [Petitioner] cannot use his own standard of conduct to justify the shooting of Gonsalves. (See *People v. Ogen, supra,* 168 Cal.App.3d at p. 622.)

. . .

According to [petitioner], the question is whether, *at the moment he inflicted the fatal wounds,* he was acting under the influence of heat of passion in response to provocation which "would cause the ordinarily reasonable person . . . to act rashly and without deliberation and reflection and

> from such passion rather than from judgment." (CALJIC No. 8.42.) We cannot, however, divorce the moment when [petitioner] shot Gonsalves from the events surrounding it. . . . Here, there was evidence that the killing of Gonsalves was the culmination of a course of conduct by an unreasonably jealous and controlling estranged husband. Thus, looking at the entire circumstances, the killing of Gonsalves was not, as a matter of law, caused by the type of passion that would cause the ordinarily reasonable person to act rashly.
>
> Accordingly, substantial evidence supports [petitioner's] conviction of second degree murder.

(People v. Nunes, Nos. A063524 and A068851, slip op. at 11-15.)

On habeas review, this court considers first whether the state court decision was erroneous. Van Tran, 212 F.3d at 1155. Thus, viewing the record evidence adduced at trial in the light most favorable to the prosecution, if this court finds that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt, Jackson, 443 U.S. at 319, the state court decision was not error.

In the present case, the court's instructions to the jury included the following. Along with the second degree murder instruction (CALJIC 8.31 and 8.30), the jury was instructed as to the definition of homicide (CALJIC 8.00), the definition of murder (CALJIC No. 8.10), and the definition of manslaughter (CALJIC 8.37). Malice aforethought was defined for the jury pursuant to CALJIC No. 8.11, and the jury was instructed that murder requires malice while manslaughter does not (see CALJIC No. 8.50). The jury was instructed pursuant to CALJIC No. 8.72 that a reasonable doubt as to whether the killing was murder or manslaughter would require a finding of manslaughter.

Although the Court of Appeal did not specifically analyze the sudden quarrel alternative, it appropriately found that petitioner

acted unreasonably both before and during the incident at issue. Rather than focusing on the precise moment when petitioner quarreled with his wife and then moved to the back bedroom and began firing wildly (as respondent argues), the appellate court considered the entire set of circumstances surrounding the incident: "there was evidence that the killing of Gonsalves was the culmination of a course of conduct by an unreasonably jealous and controlling estranged husband." The Court of Appeal accurately recounted the facts of this case: petitioner harassed his wife; he let the air out of her car tires; he made obscene phone calls; and he came to her apartment in the wee hours of the morning with a loaded gun, broke the window, brandished his gun at the people in the apartment, and, finally, finding his suspicions were apparently correct, killed the man he found lying in her bed. Under the facts of this case, there was sufficient evidence to support a finding of malice. The jury heard testimony from all the witnesses and petitioner, and were given the opportunity to decide whether petitioner's testimony was credible, and whether petitioner acted reasonably on that day. Thus, the state court was correct in holding that the evidence was sufficient to support a finding of malice, and this claim should be denied.

V. Prosecutorial Misconduct

Petitioner contends that his due process rights under the Fifth and Fourteenth Amendments were violated when the prosecutor engaged in misconduct in his closing argument which insured that petitioner did not receive a fair trial. Petitioner argues that the prosecutor's use of the phrase "whether an ordinary reasonable person's passion would be aroused to such a degree that they would kill as the [petitioner] did" deprived petitioner of a fair trial. (Second Amended Petition at 7.) Petitioner contends that the prosecutor should have argued using the question "whether the provocation is sufficient to 'render ordinary men of average disposition liable to act rashly or without due deliberation and reflection.'" (Id.)

Respondent argues that the jury was instructed that "if anything concerning the law said by the attorneys in their

arguments or at any other time during the trial conflicts with my instruction on the law, you must follow my instructions." (Mem. P's and A's, Ex. P, at 517, citing CALJIC 1.00.) Respondent contends that the Court of Appeal was correct in holding that this claim was waived by petitioner's failure to object at trial, and that the failure to object was not ineffective assistance of counsel because it was a tactical choice to avoid drawing attention to the prosecutor's argument. Finally, respondent counters that the prosecutor' s line of argument was not misconduct because the legislative history for section 192 states that murder can be reduced to manslaughter "only in those situations where the provocation would trigger a homicidal reaction in a reasonable person." (Mem. P's & A's at 51, citing People v. Nunes, Nos. A063524 and A068851, slip op. at 18 n.6.)

Success on a claim of prosecutorial misconduct requires a showing that the conduct so infected the trial with unfairness as to make the resulting conviction a denial of due process. Greer v. Miller, 483 U.S. 756, 765 (1987). The conduct must be examined to determine "whether, considered in the context of the entire trial, that conduct appears likely to have affected the jury's discharge of its duty to judge the evidence fairly." United States v. Simtob, 901 F.2d 799, 806 (9th Cir.1989). Generally, if an error of constitutional magnitude is determined, a harmless error analysis ensues. Error is considered harmless if the court, after reviewing the entire trial record, decides that the alleged error did not have a "substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 638 (1993). Error is deemed harmless unless it "is of such a character that its natural effect is to prejudice a litigant's substantial rights." Kotteakos v. United States, 328 U.S. 750, 760-761 (1946).

Depending on the case, a prompt and effective admonishment of counsel or curative instruction from the trial judge may effectively "neutralize the damage" from the prosecutor's error. U.S. v. Weitzenhoff, 35 F.3d 1275, 1291 (9th Cir.) (citing Simtob, 901 F.2d at 806.)

Under California law, failure to object at trial is a procedural bar to appellate review on the merits. Thus, this court can only consider petitioner's prosecutorial misconduct claim on the merits if this court finds that the procedural default is excused by cause and was prejudicial. See Edwards v. Carpenter, 529 U.S. 446, 451 (2000).

Ineffective assistance of counsel can be cause for the default. See Murray v. Carrier, 478, 488 (1986). In order to demonstrate that his counsel was constitutionally ineffective, petitioner must show that his lawyer's performance was objectively unreasonable and that he was prejudiced therefrom. See id.; Strickland, 466 U.S. at 687. Although there is a strong presumption that defense counsel's conduct fell within the wide range of reasonable professional assistance, petitioner may overcome that presumption by demonstrating that, under the circumstances, there was no discernible tactical explanation for his counsel's omission. See Strickland, 466 U.S. at 689; see also Harris v. Wood, 64 F.3d 1432, 1435-38 (9th Cir.1995); United States v. Mitchell, 1 F.3d 235, 243 (4th Cir.1993); Mak v. Blodgett, 970 F.2d 614, 619 (9th Cir.1992).

The California Court of Appeal resolved this claim as follows:

> The failure to make objections usually involves tactical decisions on counsel's part and seldom establishes counsel's incompetence. [Citation omitted.] "'Matters involving trial tactics are matters "as to which we will not ordinarily exercise judicial hindsight." [Citation.] "In the heat of a trial, [petitioner's] counsel is best able to determine proper tactics in the light of the jury's apparent reaction to the proceedings. Except in rare cases an appellate court should not attempt to second-guess trial counsel. . . ." [Citations.] . . . "The choice of when to object or not is inherently a matter of trial tactics not ordinarily reviewable on appeal; failure to object does not necessarily indicate incompetence. . . ."'" [Citations omitted.]

> In the circumstances of this case, it appears to have been a perfectly reasonable tactical choice on defense counsel's part to refrain from objecting and drawing further attention to the portion of the prosecutor's argument in question. [Footnote and citation omitted.] This is especially true in light of the fact that the trial court instructed the jury that to the extent arguments by counsel conflicted with its instructions on the law, the jury must follow the instructions.
>
> In sum, counsel's failure to object did not constitute ineffective assistance, and the failure to object to the alleged prosecutorial misconduct waived the issue for appeal.

(People v. Nunes, Nos. A063524 and A068851, slip op. at 17-18.)

Having reviewed the record, this court finds that there could have been a strategic or tactical justification for defense counsel's failure to object to the prosecutor's argument. (EHT 83.) In addition, the prosecutor's arguments were not clearly improper under California law, see People v. Heckathorne, 202 Cal.App.3d 458, 248 Cal.Rptr. 399, 400-02 (1988), because the Legislature provided for the reduction from murder to manslaughter only in those situations where provocation triggered a homicidal reaction in a reasonable person. People v. Ogen, 168 Cal.App.3d 611, 622 (1985). Therefore, defense counsel's failure to object was not unreasonable.

Moreover, this court finds that petitioner was not prejudiced because it is not clear that, but for defense counsel's error, there is a reasonable probability that the outcome of petitioner's trial would have been different. See Strickland, 466 U.S. at 694. A "reasonable probability" is a probability sufficient to undermine our confidence in the outcome. Id. This court cannot find that the prosecutor's use of the phrase "whether an ordinary reasonable person's passion would be aroused to such a degree that they would kill as the [petitioner] did," rather than the question "whether the provocation is sufficient to 'render

ordinary men of average disposition liable to act rashly or without due deliberation and reflection,' would have caused the jury to render a voluntary manslaughter verdict rather than a second degree murder verdict. The jury was instructed that the attorney's arguments was not the law or evidence. The jury was specifically instructed that "statements made by the attorneys during the trial are not evidence." CALJIC 1.02.

Because of the substantial evidence against petitioner, this court's confidence in the outcome of the case is not shaken. Therefore, this court concludes that the procedural default of petitioner's prosecutorial misconduct claim is not obviated by ineffective assistance of counsel, and thus does not reach the merits of that claim.

VI. Error in Voluntary Intoxication Jury Instruction

Petitioner's sixth claim is that the trial court erred in instructing the jury that voluntary intoxication is not a defense to a crime without explaining that this rule did not apply to specific intent or malice. Respondent contends that petitioner is procedurally barred from raising this claim because trial counsel did not object to the jury instruction in the trial court. (Answer at 5.) Respondent argues that although the Court of Appeal found the trial court's failure to give new CALJIC No. 4.21.1 or to otherwise explain the difference between CALJIC Nos. 4.20 and 4.21 was error, and the appellate court correctly found such error to be harmless.

In his traverse, petitioner argues that defense counsel's discussion in his closing argument focused on the impact of voluntary intoxication upon the intent to kill element but failed to clarify for the jury that it also impacted the element of malice. Petitioner contends that the jury was required to determine what effect voluntary intoxication had upon petitioner's absence of malice – "what effect it had upon the adequacy of provocation to a reasonable, but also drunk, man." (Traverse at 13.) Petitioner argues that defense counsel's statement that "in addition to which you have to find that the alcohol had no [e]ffect on his mental state whatsoever, at least it didn't have any impact on his ability to form the specific intent or the

express malice," was not a discussion of the impact of being drunk upon a reasonable man's heat of passion or sudden quarrel. (Id.) Thus, petitioner contends this jury instruction error was not harmless.

A challenge to jury instructions does not generally state a federal constitutional claim. See Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir.1985), cert. denied, 478 U.S. 1021 (1986) (citing Engle v. Isaac, 456 U.S. 107, 119 (1982)); Gutierrez v. Griggs, 695 F.2d 1195, 1197 (9th Cir.1983). Habeas corpus is unavailable for alleged error in the interpretation or application of state law. Middleton, 768 F.2d at 1085; see also Lincoln v. Sunn, 807 F.2d 805, 814 (9th Cir.1987); Givens v. Housewright, 786 F.2d 1378, 1381 (9th Cir.1986). However, a "claim of error based upon a right not specifically guaranteed by the Constitution may nonetheless form a ground for federal habeas corpus relief where its impact so infects the entire trial that the resulting conviction violates the defendant's right to due process." Hines v. Enomoto, 658 F.2d 667, 673 (9th Cir.1981) (citing Quigg v. Crist, 616 F.2d 1107 (9th Cir.1980), cert. denied, 449 U.S. 922 (1980)); see also Lisenba v. California, 314 U.S. 219, 236 (1941).

In order to warrant federal habeas relief, a challenged jury instruction "cannot be merely 'undesirable, erroneous, or even "universally condemned,"' but must violate some due process right guaranteed by the fourteenth amendment." Prantil v. California, 843 F.2d 314, 317 (9th Cir.1988), cert. denied, 488 U.S. 861 (1988) (quoting Cupp v. Naughten, 414 U.S. 141, 146 (1973)). To prevail, petitioner must demonstrate that an erroneous instruction "'so infected the entire trial that the resulting conviction violates due process.'" Estelle v. McGuire, 502 U.S. 62, 72 (1991) (quoting Cupp, 414 U.S. at 147). In making its determination, this court must evaluate the challenged jury instructions "'in the context of the overall charge to the jury as a component of the entire trial process.'" Prantil, 843 F.2d at 817 (quoting Bashor v. Risley, 730 F.2d 1228, 1239 (9th Cir.1984), cert. denied, 469 U.S. 838 (1984)). Further, in reviewing an allegedly ambiguous instruction, the court "must inquire 'whether there is a reasonable likelihood

that the jury has applied the challenged instruction in a way' that violates the Constitution." Estelle, 502 U.S. at 72 (quoting Boyde v. California, 494 U.S. 370, 380 (1990)).

A state trial court's failure to give an instruction does not alone raise a ground cognizable in a federal habeas corpus proceeding. Dunckhurst v. Deeds, 859 F.2d 110, 114 (9th Cir.1988). The error must so infect the entire trial that petitioner was deprived of his right to a fair trial guaranteed by the Due Process Clause of the Fourteenth Amendment. Id. "Whether a constitutional violation has occurred will depend upon the evidence in the case and the overall instructions given to the jury." Duckett v. Godinez, 67 F.3d 734, 745 (9th Cir.1995), cert. denied, 517 U.S. 1158 (1996). "'An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law' and, thus, a habeas petitioner whose claim involves a failure to give a particular instruction bears an 'especially heavy burden.'" Villafuerte v. Stewart, 111 F.3d 616, 624 (9th Cir. 1997) (quoting Henderson v. Kibbe, 431 U.S. 145, 155, (1977)) (habeas petitioner must establish both deficient performance and prejudice before he is entitled to relief). "The significance of the omission of such an instruction may be evaluated by comparison with the instructions that were given." Henderson, 431 U.S. at 156.

As noted above, under California law, failure to object at trial is a procedural bar to appellate review on the merits. Thus, this court can only consider petitioner's jury instruction claim on the merits if this court finds that the procedural default is excused by cause and was prejudicial (see Edwards, 529 U.S. at 451), and ineffective assistance of counsel can be such a cause. See Murray, 477 U.S. at 488. Petitioner must demonstrate both the cause and prejudice prongs of Strickland to succeed on this claim. Strickland, 466 U.S. at 688-93. If a petitioner cannot show prejudice, the inquiry need not go any further. Id. at 697. Although there is a strong presumption that defense counsel's conduct fell within the wide range of reasonable professional assistance, petitioner may overcome that presumption by demonstrating that, under the circumstances, there was no discernible tactical explanation for his counsel's omission. See

Strickland, 466 U.S. at 689; see also Harris, 64 F.3d at 1435-38; United States v. Mitchell, 1 F.3d at 243; Mak, 970 F.2d at 619. As the Court of Appeal noted, however, the merits of this claim must be evaluated to determine whether petitioner was prejudiced by the omission.

After analyzing the jury instructions that were given, the California Court of Appeal concluded that "the trial court's failure to give new CALJIC No. 4.21.1 or to otherwise explain the apparent contradiction between CALJIC Nos. 4.20 and 4.21 was error." (People v. Nunes, Nos. A063524 and A068851, slip op. at 21.) But after reviewing the circumstances of this case, the Court of Appeal found such error harmless:

> First, to the extent the giving of CALJIC No. 4.21 immediately after CALJIC No. 4.21 confused the jury as to the applicability of voluntary intoxication to the case, such confusion was alleviated by the court's later repetition, during a break in closing arguments, of the part of CALJIC No. 4.21 dealing with the effect of voluntary intoxication on specific intent in relation to the crimes of murder and voluntary manslaughter. [Footnote omitted.] Defense counsel in fact took advantage of the court's supplemental instruction by immediately thereafter, and again later, explaining to the jury in great detail the meaning and importance of the instruction. . . .
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> . . .
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> The court's supplemental reading of CALJIC No. 4.21 – given quite awhile after its initial reading of CALJIC Nos. 4.21 and 4.20 – which explained that voluntary intoxication can negate the specific intent required for conviction of murder or voluntary manslaughter, immediately followed by counsel's detailed discussion of the meaning of that instruction and its effect on the case, clearly counteracted any confusion that may have been caused by the initial reading of the two instructions. [Citation omitted.]

(People v. Nunes, Nos. A063524 and A068851, slip op. at 21-23.)

The Court of Appeal was correct in finding that the trial court erred by failing to give the jury instruction CALJIC No. 4.21.1, which would have clarified for the jury how the issue of voluntary intoxication affected the three different crimes charged: second degree murder, voluntary manslaughter and involuntary manslaughter. On habeas review, the failure to give this instruction is "evaluated by comparison with the instructions that were given." Henderson, 431 U.S. at 156.

In the present case, other jury instructions offered the jury insight into the differences among these crimes. CALJIC 3.31 instructed the jury that for the crimes of murder and voluntary manslaughter, a certain specific intent in the mind of the perpetrator must exist. Id. That jury instruction informed the jury that unless such specific intent existed, the crime to which it related was not committed, and referred the jury to the jury instruction defining the crime charged to ascertain the specific intent required. Id. CALJIC 3.31.5 explained that a certain mental state must exist in the mind of petitioner before the jury could find him guilty of murder. Id.

CALJIC 4.21 informed the jury that the existence in the mind of the petitioner of the mental state of malice aforethought is required for a finding of murder. Id. This instruction also stated that "[i]f the evidence shows that the [petitioner] was intoxicated at the time of the alleged crime, you should consider that fact in determining whether [petitioner] had such mental state." Id. The instruction explained that if the jury had a reasonable doubt whether petitioner formed such mental state, the jury must find he did not have such mental state. Id. This CALJIC 4.21 jury instruction was the one supplemented by the judge, when he interrupted closing argument to modify it:

> There was one instruction, ladies and gentlemen, that was brought to my attention needed . . . some slight modification. . . . [W]hat we've done is add 29A, which is just in addition to that concept on 29. This expands on

it slightly, and it's significant enough I think that I should go ahead and read it to you.

> In the crimes of murder with express malice and voluntary manslaughter, a necessary element is the existence in the mind of the [petitioner] of the specific intent to kill.
>
> If the evidence shows that the [petitioner] was intoxicated at the time of the alleged crime, you should consider that fact in determining whether [petitioner] had such specific intent.
>
> If from all the evidence you have a reasonable doubt whether the [petitioner] formed such specific intent, you must find that he did not have such specific intent.

That instruction, even though read out of context of the others, you shouldn't give it any more importance than you do the rest.

(Answer, Ex. P6, at 586-587.)

The jury was further instructed that express malice was defined as manifesting an intent to unlawfully kill a human being, and that malice could be implied when: 1) the killing resulted from an intentional act; 2) the natural consequences of the act are dangerous to human life; and 3) the act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. CALJIC 8.11. The jury was also instructed on the distinction between murder and manslaughter. CALJIC 8.50.

CALJIC 3.30 explained to the jury that involuntary manslaughter was a general criminal intent crime. Id. CALJIC 4.20 stated as follows: "The law provides that no act committed by a person while in the state of voluntary intoxication is less criminal by reason of his having been in such condition. [¶] In the lesser-related crime of involuntary manslaughter, the fact

that the [petitioner] was voluntarily intoxicated is not a defense and does not relieve him of responsibility for the crime." Id. Thus, the jury was specifically instructed that voluntary intoxication was not a defense in the lesser related crime of involuntary manslaughter, distinguishing it from its application to the crimes of murder and voluntary manslaughter.

In addition, the trial court separately instructed the jury on voluntary intoxication. CALJIC 4.22.

Therefore, although the giving of CALJIC 4.20 immediately after CALJIC 4.21 (Answer, Ex. P6 at 529) might have initially confused the jury as to the role of voluntary intoxication, the trial judge's reading of the revised CALJIC 4.21 during closing argument served to clarify its role in their deliberations. This additional instruction, taken together with the other jury instructions previously given to the jury, explained to the jury that voluntary intoxication was to be considered with regard to the charges of murder and voluntary manslaughter. The jury was given all the jury instructions in written form for reference during deliberations. (Answer, Ex. P6, at 516.)

In addition, as the Court of appeal noted, petitioner's defense counsel used this additional jury instruction reading to his advantage by explaining it in detail immediately thereafter.

> [S]ince Mr. Nunes was drink[ing] heavily in the morning and evening of the 12th and 13th, that, in fact, with the instruction, the law is that the alcohol could prevent him from being able to form the specific intent or the implied or express malice.
>
> If you find the alcohol, in and of itself, prevented him from forming that type of express malice, that alone, the alcohol alone, without passion, without anything else, will reduce the crime from – essentially, from murder in the second degree to a manslaughter.
>
> But it would be an involuntary manslaughter versus the voluntary manslaughter, because you would have no

> specific intent, and specific intent is required in the crime of voluntary manslaughter.
>
> So . . . you're clear, alcohol alone could reduce this crime from second degree murder or voluntary manslaughter to involuntary manslaughter.
>
> And if you look at the combination in a different perspective, if you look at the combination of the alcohol, the heavy drinking, his mental state and the facts and position that he was confronted with, clearly, this is a crime that would relate to manslaughter and not a homicide.

(Answer, P6, at 587-88.)

The record demonstrates that the omission of CALJIC No. 4.21.1 did not result in a violation of due process because the instructions and arguments presented to the jury properly informed it of the prosecution's burden of proof. See Duckett v. Godinez, 67 F.3d at 743-46 (no due process violation where instructions taken as a whole adequately covered defendant's theory). The trial court instructed the jury on second degree murder, voluntary manslaughter, involuntary manslaughter, heat of passion and provocation (CALJIC 8.42) and voluntary intoxication. It also instructed the jury on the presumption of innocence and the general burden of proof of the prosecutor to prove guilt beyond a reasonable doubt; that when the evidence was susceptible to two reasonable interpretations of petitioner's mental state, the interpretation favorable to the defense must be adopted; and that if the jury was satisfied that the killing was unlawful but had a reasonable doubt as to whether it was murder or manslaughter, it must find manslaughter.

In addition, petitioner argued that for any verdict of murder there must be proof beyond a reasonable doubt that the killing was not done in the heat of passion or upon a sudden quarrel. The prosecutor did not argue to the contrary and stated that "the People have the burden of proof and the burden of proof is beyond a reasonable doubt." There is no "reasonable

likelihood," considering the record as a whole, that the jury misunderstood the prosecutor's burden of proof with regard to the element of malice. See Estelle v. McGuire, 502 U.S. at 72 & n.4, 74-75 (no due process violation where there is no reasonable likelihood that jury applied instructions in way that violates Constitution).

Thus, petitioner is not entitled to habeas relief based on this claim. He has not shown that the omission of CALJIC No. 4.21.1 violated due process and had a "'substantial [and] injurious effecct' on the verdict." Villafuerte, 111 F.3d at 624 (quoting Brecht v. Abrahamson, 507 U. S. 619, 637 (1993)).

VII. Final Ineffective Assistance of Counsel Claim

Petitioner's seventh and final claim is that his trial counsel was ineffective in failing to request a jury instruction to the effect that legally adequate provocation could occur over a considerable period of time. Petitioner contends that had the jury been properly instructed, the jury could have found that provocation started as early as petitioner's unwilling separation from his wife a month before the shooting, or when petitioner found his wife at a bar with her friend he believed to be a bad influence on his wife.

Respondent contends that petitioner suffered no prejudice from the omission of this jury instruction because defense counsel argued that provocation could occur over a considerable period of time and the prosecutor did not object to those statements.

As noted above, a petitioner alleging ineffective assistance of counsel must show two things, deficient performance and prejudice flowing from that error. Strickland, 466 U.S. at 688-93. If a petitioner cannot show prejudice, the inquiry need not go any further. Id. at 697.

The Court of Appeal found that petitioner did not request the court to include the optional language provided in CALJIC No. 8.42, and, because the request would have been a request for a pinpoint instruction, the court was not required to include the

language sua sponte. (People v. Nunes, Nos. A063524 and A068851, slip op. at 25.) In response to petitioner's contention that his trial counsel was ineffective for failing to request such a pinpoint instruction, the Court of Appeal found that petitioner could not meet the prejudice prong of Strickland:

> We find no prejudice in this case since, assuming arguendo that counsel should have requested the optional . . . language, there was, . . . "evidence before the jury showing provocation occurring over a period of time and no instruction precluding the jury from giving that evidence its due weight." (Citation omitted.) In addition, defense counsel emphasized in closing argument that the period of provocation was considerable, extending back to his first separation from Prien in 1986. Counsel urged the jury to consider [petitioner's] alcoholism, his low self-esteem, his depression, and his prior suicide attempts in combination with the events on the night and morning of the murder. Counsel also discussed [petitioner's] and Prien's relationship, including her alleged dishonesty and other ongoing provocatory conduct. Moreover, the prosecutor never disputed that the period of provocation can be considerable. (See *ibid.*)
>
> Accordingly, since [petitioner] has not shown prejudice, that is, that absent counsel's failings a more favorable result would have been probable, his ineffective assistance of counsel claim must fail. (See *People v. Cummings, supra,* 4 Cal.4th at p. 1339.)

(Answer, Ex. I, at 24-27.)

As noted above, in reviewing an allegedly ambiguous instruction, the court "must inquire 'whether there is a reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution." Estelle, 502 U.S. at 72 (quoting Boyde v. California, 494 U.S. 370, 380 (1990)).

CALJIC 8.42 was constitutionally adequate because there

was not a reasonable likelihood that the instruction caused the jury to misunderstand the law. Petitioner's counsel argued that the period of provocation was considerable, suggesting that it began during his first separation from his wife in 1986. The prosecutor did not argue that the period of provocation could not be that long. Therefore, failing to request pinpoint instructions on this issue would not have changed the outcome of the trial, and petitioner was thus not prejudiced. This claim must also fail.

Accordingly, IT IS HEREBY RECOMMENDED that petitioner's application for a writ of habeas corpus be granted in part and denied in part:

1. Petitioner's ineffective assistance of counsel claim as to the plea offer be granted, and the state be directed to vacate the second degree murder conviction and reinstate the voluntary manslaughter plea offer to petitioner; and

2. The remainder of petitioner's claims be denied.

These findings and recommendations are submitted to the United States District Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within twenty days after being served with these findings and recommendations, any party may file written objections with the court and serve a copy on all parties. Such a document should be captioned "Objections to Magistrate Judge's Findings and Recommendations." Any reply to the objections shall be served and filed within ten days after service of the objections. The parties are advised that failure to file objections within the specified time may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153 (9th Cir.1991).

DATED: November 20, 2002.

/s/
JOHN F. MOULDS
UNITED STATES MAGISTRATE JUDGE